DANIEL ROSENTHAL ET AL. *v.* TOWN OF BLOOMFIELD ET AL.
(AC 38893)

Lavine, Kahn and Bishop, Js.*

Syllabus

The plaintiffs, a group of retirees from the police department of the defendant town of Bloomfield, brought this action for, inter alia, breach of contract in connection with the plaintiffs' 1994 retirement pension plan, which was part of a collective bargaining agreement between the town and the plaintiffs' union. The 1994 pension plan provided that the town would make available to qualifying retirees and their enrolled dependents a certain health insurance plan. The pension plan subsequently was amended to provide that the town would make available the agreed on health insurance plan or a comparable plan. Thereafter, the town entered into an employment agreement with the union that changed the health insurance plan to a different plan, which increased certain co-payments and eliminated others. The town also notified the plaintiffs that the employment agreement was applicable to them. The plaintiffs then commenced the present action, claiming that the town had breached the terms of their 1994 pension plan by changing their health insurance plan to a plan that was not comparable because the new plan increased co-payments for certain medical and health care services. After the plaintiffs submitted an offer of proof, the town filed a motion for a judgment of dismissal for failure to make out a prima facie case pursuant to the applicable rule of practice (§ 15-8). The trial court granted the town's motion and rendered judgment thereon, finding that, pursuant to *Poole* v. *Waterbury* (266 Conn. 68), the plaintiffs had failed to set forth a prima facie case of breach of contract. On the plaintiffs' appeal to this court, *held* that the trial court did not err in granting the town's motion for a judgment of dismissal, the plaintiffs having failed, as a matter of law, to set forth sufficient evidence that, if believed, would establish a prima facie case of breach of contract; the plaintiffs failed to establish any significant changes or reduction in their benefits and, thus, failed to demonstrate, in accordance with *Poole*, that the insurance benefits under the new health insurance plan were not substantially commensurate with the benefits under the prior plan when viewing the group of plaintiffs as a whole, as the increase in some co-payments while eliminating others did not demonstrate that the plaintiffs' benefits as a group were significantly reduced or not comparable to their benefits under the prior plan.

Argued September 11—officially released November 28, 2017

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. Jerry Wagner*, judge trial referee, granted the defendants' motion to strike; thereafter, the court, *Elgo*, *J.*, granted the named defendant's motion to bifurcate the issues of liability and damages; subsequently, the case was tried to the court, *Elgo*, *J.*; thereafter, the court granted the named defendant's motion for a judgment of dismissal and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Rachel M. Baird, with whom, on the brief, was *Mitchell Lake*, for the appellants (plaintiffs).

William A. Ryan, with whom was *Ian E. Bjorkman*, for the appellee (named defendant).

Opinion

KAHN, J. The plaintiffs, a group of twenty-four retirees from the Bloomfield Police Department,[1] appeal from the judgment of the trial court granting the motion for a judgment of dismissal filed by the defendant town of Bloomfield (town)[2] pursuant to Practice Book § 15-8 for failure to make out a prima facie case. The plaintiffs claim that the court erred in so ruling because the evidence submitted set forth a prima facie case that

[1] The plaintiffs are Daniel Rosenthal, Jeffrey Blatter, John Maziarz, Judy Smith, John Ferrigno, Mark Darin, Robert Lostimolo, Michelle Lostimolo, Rebecca Leger, Lee Tager, Robert Black, John Swanson, Alan Cox, William Brewer, Michael Driscoll, Sean Kenney, Steven Weisher, Richard Lyon, Jr., Elvis Fabi, Raymond Kitchens, Charlie Simmons, Alfred Delciampo, Cindi Lloyd, and Doris Hudson.

[2] The plaintiff also named Louie Chapman, Jr., William J. Hogan, and Cindy Coville, all employees or officials of the town, as defendants. The court granted the motion to strike the counts against these defendants based on qualified immunity.

the town breached the parties' collective bargaining agreement by failing to offer insurance benefits that are comparable to benefits under a prior health insurance plan. We disagree and affirm the judgment of the trial court.

There is no dispute as to the language of the applicable provision, § 17 (1) (B) of the plaintiffs' pension retirement plan (1994 pension plan), which was formed pursuant to a 1994 collective bargaining agreement (1994 agreement) between the town and the plaintiffs' union, the International Brotherhood of Police Officers, Local 335. Section § 17 (1) (B) of the 1994 pension plan stated in relevant part: "The Town shall make available to each full-time employee who retires after July 1, 1989 and his/her enrolled dependents Major Medical, Blue Cross Hospitalization and Blue Shield coverage as if the said retired employee were still working . . . ."[3] The 1994 pension plan, however, subsequently was amended several times, including on February 2, 1995, when the word "still" was removed from § 17 (1) (B) and the phrase "or comparable insurance" was added. The revised section stated in relevant part: "The Town shall make available to each full time employee who retires after July 1, 1989 and his/her enrolled dependents Major Medical, Blue Cross Hospitalization and Blue Shield coverage, *or comparable insurance*, as if the said retired employee were working." (Emphasis added.)[4] The parties agreed and the trial court concluded that "comparable" did not mean "the same," and, as such, the unambiguous contract language manifested the intent of the parties that the town have some flexibil-

[3] Section 17 (1) (B) of the 1994 pension plan also set forth the premium cost sharing as follows: "The Town shall pay one hundred percent (100%) of the retiree's premium and sixty-six and two thirds percent (66-2/3%) of the additional cost of dependent coverage and the retiree shall pay the remaining costs."

[4] On August 28, 2000, § 17 (1) (B) was amended, changing July 1, 1989 to July 1, 1999.

ity to offer health insurance plans that were not exactly the same as the existing plan.

On October 19, 2012, the town entered into an employment agreement with the United Public Service Employees Union/COPS, Unit #14 (2012 agreement), which changed the health insurance plan under the 1994 pension plan to the "Anthem Blue Cross Century Preferred $20 Co-pay plan with a 3-Tier Prescription Drug benefit" (Century Preferred $20 plan). Effective September 1, 2012, this agreement also applied to retired employees who had not yet reached sixty-five years of age and their dependents. On July 20, 2012, the town provided the plaintiffs with notice of this change.

The plaintiffs commenced this action alleging, inter alia, that the town breached the terms of the 1994 pension plan by changing their health insurance plan to a plan that is not comparable.[5] Specifically, the plaintiffs argued that the 2012 agreement resulted in a 50 percent increase in co-pays for emergency room visits (from $50 to $75), a 100 percent increase in co-pays for office visits (from $10 to $20), an increase for emergency room visits from $0 to $100, and a 100 percent increase in urgent care co-pays (from $25 to $50). The plaintiffs sought to compel the town to provide the medical and health care benefits in place prior to September 1, 2012. The plaintiffs sought an injunction, monetary damages and attorney's fees and costs.

At the commencement of trial on September 29, 2015, the court bifurcated the proceeding so that liability would be determined prior to the issue of damages. The liability issue presented was whether the Century Preferred $20 plan was comparable to the "Major Medical, Blue Cross Hospitalization and Blue Shield Coverage," referenced in § 17 (1) (B) of the 1994 pension

[5] The complaint also alleged unjust enrichment and ultra vires acts. The court considered those claims abandoned due to the plaintiffs' failure to brief them, and granted the town's motion for a judgment of dismissal as

plan. After a discussion, the plaintiffs agreed that they would proceed with the trial on this issue by submitting an offer of proof on their claim that the Century Preferred $20 plan was not comparable to the 1994 pension plan. The parties also agreed to the admission into evidence of the 1994 agreement and the 1995 and 2000 amendments thereto. On October 5, 2015, the plaintiffs filed their offer of proof with the court. The town filed a motion for a judgment of dismissal pursuant to Practice Book § 15-8 on the basis that the plaintiffs had set forth insufficient evidence to establish a prima facie case in support of their complaint. The court granted the motion, finding that the contract language was unambiguous; that *Poole* v. *Waterbury*, 266 Conn. 68, 831 A.2d 211 (2003), was controlling; and that the plaintiffs had not set forth a prima facie case of breach of contract.[6] This appeal followed.

"The standard for determining whether the plaintiff has made out a prima facie case, under Practice Book § 15-8, is whether the plaintiff put forth sufficient evidence that, if believed, would establish a prima facie case, not whether the trier of fact believes it. . . . For the court to grant the motion [for judgment of dismissal pursuant to Practice Book § 15-8], it must be of the opinion that the plaintiff has failed to make out a prima facie case. In testing the sufficiency of the evidence, the court compares the evidence with the allegations of the complaint. . . . In order to establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove. . . . [T]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most favorable to [the plaintiff], and

to those claims as well. On appeal, the plaintiffs do not claim error as to the court's dismissal of those claims.

[6] The plaintiffs do not challenge either the finding that the contract language was unambiguous or that the interpretation of that language is governed by *Poole* v. *Waterbury*, supra, 266 Conn. 68.

every reasonable inference is to be drawn in [the plaintiff's] favor." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Gambardella* v. *Apple Health Care, Inc.*, 86 Conn. App. 842, 846, 863 A.2d 735 (2005). "Whether the plaintiff has made out a prima facie case is a question of law, over which our review is plenary." *Moss* v. *Foster*, 96 Conn. App. 369, 378, 900 A.2d 548 (2006).

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Chiulli* v. *Zola*, 97 Conn. App. 699, 706–707, 905 A.2d 1236 (2006). "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Poole* v. *Waterbury*, supra, 266 Conn. 88.

Here, there is no dispute as to the interpretation of the language of the 1994 pension plan, as amended, or the benefits and terms of the various health care plans. At issue is whether the Century Preferred $20 plan violated the term of the 1994 pension plan requiring comparable insurance as governed by *Poole*. Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) defines "comparable" as "similar, like."

In *Poole*, retired firefighters filed an action against the defendant city when the city unilaterally switched the retirees from the traditional indemnity plan that the firefighters had, as the result of collective bargaining agreements, to a managed health care plan. Id., 71–73. The trial court held that the retirees had a vested contractual right in the health care plan referenced in the collective bargaining agreements. Id., 78. On appeal, our Supreme Court determined that although the retirees'

rights to their retirement benefits had vested, the retirees did not have a vested right in precisely the same health care plan that was in effect at the time of their retirement. Id, 99–106. The Supreme Court determined that the language of the collective bargaining agreements in that case unambiguously "manifest[ed] the parties' intent that the city retain the right to make limited modifications to the benefits plan." Id., 100.

In *Poole*, there were three areas of change between the traditional indemnity plan and the managed health care plan affecting the retirees: (1) the imposition of a $5 to $15 co-payment for each health service utilized; (2) full costs not paid if the service provider is out of network; and (3) the insurer maintaining a schedule of the presumptive amount of services necessary per medical condition instead of the physician determining the amount of services necessary. Id., 105–106. The Supreme Court noted the trial court's findings that although "a managed health care plan is inherently less flexible than the traditional indemnity plan, it is by no means certain from the evidence that a given beneficiary will always fare worse under the new health care plan than the old. . . . Depending on what health problems occur for a specific beneficiary and what services or prescription medications are necessary, the evidence demonstrated that there are situations in which the out-of-pocket costs can indeed be greater under the old plan than the new." (Internal quotation marks omitted.) Id., 107. The Supreme Court concluded that the retirees did not establish that the differences between the plans "resulted in a new plan that either substantially reduced the provision of services or substantially increased the cost to the group of plaintiffs as a whole. Accordingly, the modifications made by the defendants affected the form, and not materially the substance, of the vested benefit." (Footnote omitted.) Id., 107.

In the present case, the plaintiffs argue that a prima facie case for a breach of contract action had been set

forth because the plaintiffs' insurance benefits under the Century Preferred $20 plan are not comparable to those under the 1994 pension plan. In support of their claim, they point to increases in some of the co-pays. Pursuant to *Poole*, in order for the plaintiffs to prevail, they must demonstrate that the changes to their benefits are not substantially commensurate with the benefits provided under the 1994 agreement, when viewing the group of plaintiffs as a whole. See id., 105.

The plaintiffs have not set forth a prima facie case that the Century Preferred $20 plan was not substantially commensurate to the 1994 pension plan. Although the plaintiffs point to higher co-payments as the source of changes between the plans, a review of the earlier Century Preferred $10 and $5 co-pay plans with the new Century Preferred $20 plan reveals that although, under the new plan, some co-pays were higher, others, such as preventative care and routine eye examinations, no longer required co-payments. In response to an individual plaintiff's question about the Century Preferred $20 plan, the human resources generalist for the town noted that "there has not been a reduction in your medical benefit coverage. All services previously offered are still in effect—some no longer require co-pays while others require higher co-pays." Other than the changes in co-pays, the plaintiffs failed to establish any significant changes or reduction in benefits.

The increase in some co-payments while eliminating others does not demonstrate that the benefits of the plaintiffs as a whole were significantly reduced or not comparable to their prior benefits. "It will not suffice for the plaintiffs to demonstrate that the changes have increased payments for some retired employees. The changes should be examined for their effect on the class of retirees as a whole, to determine if they have significantly reduced their general level of benefits. In addition, individual modifications should not be scrutinized in isolation. In other words, the changes must be

examined in their totality for their effect upon the class of retirees as a group." (Internal quotation marks omitted.) *Poole* v. *Waterbury*, supra, 266 Conn. 104–105. After conducting such a review, the trial court in the present case concluded: "Given that the changes described in *Poole* included not only co-payments but more far-reaching changes than what are at issue here, this court cannot conclude that the plaintiffs have shown that the [Century Preferred $20] plan is not comparable to the earlier plans." Because the plaintiffs have not, as a matter of law, set forth sufficient evidence that, if believed, would establish a prima facie case of breach of contract, the trial court did not err in granting the town's motion for a judgment of dismissal.

The judgment is affirmed.

In this opinion the other judges concurred.

ANGEL MELETRICH *v.* COMMISSIONER OF CORRECTION
(AC 38418)

Lavine, Elgo and Beach, Js.

Syllabus

The petitioner, who had been convicted of the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, larceny in the first degree, and conspiracy to commit larceny in the first degree, sought a writ of habeas corpus. He claimed, inter alia, that his trial counsel provided ineffective assistance by failing to present the testimony of the petitioner's aunt, G, as an alibi witness at the criminal trial. The petitioner's conviction stemmed from a robbery that took place at a fast-food restaurant, in which three men with concealed faces entered the restaurant through a side door. One of the employees of the restaurant, B, admitted to the police that she was involved in the robbery and claimed that before she went to work she had met the petitioner and another person, who asked her to leave the door open at closing time so that they could rob the restaurant. The habeas court rendered judgment denying the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's claim that his trial

counsel had rendered ineffective assistance by failing to call G as an additional alibi witness during the criminal trial, as the petitioner failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced by his trial counsel's decision, and a resolution of the claim did not involve an issue that was debatable among jurists of reason.

2. The habeas court did not err in concluding that the petitioner's trial counsel was not deficient in failing to call G to testify: although G testified that the petitioner was home at the time of the robbery and when he was alleged to have met with B to discuss his plan to rob the restaurant, it was clear that G was not with the petitioner every moment, the jury reasonably could have inferred, given the close proximity of the restaurant, that the petitioner could have left G's house to confront B on her way to work without G's knowledge, G's testimony would have been cumulative of the testimony of D that she had been with the petitioner every moment during the time period of the robbery and beforehand, and trial counsel testified at the habeas trial that, following an investigation, he had determined that D could provide the best alibi because she could cover the petitioner's whereabouts at the time of the robbery; moreover, the petitioner was not prejudiced by the failure of his trial counsel to call G as a witness, as G's testimony was cumulative and did not provide the petitioner with an airtight alibi, G was not an entirely neutral and disinterested witness, the jury could have found that the petitioner had conspired about the robbery at a time prior to when he was with D at G's house, and, therefore, this court's confidence in the verdict was not undermined by the failure of trial counsel to present G's testimony.

Argued September 8—officially released November 28, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, and tried to the court, *Fuger*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Matthew C. Eagan, assigned counsel, with whom were *Michael S. Taylor*, assigned counsel, and, on the brief, *Emily Graner Sexton*, assigned counsel, for the appellant (petitioner).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Lisa Maria Proscino*, former special deputy assistant state's attorney, for the appellee (respondent).

Opinion

BEACH, J. The petitioner, Angel Meletrich, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and erred in not finding that his trial counsel provided ineffective assistance by failing to call the petitioner's aunt as an additional alibi witness during the petitioner's criminal trial. We disagree and, accordingly, dismiss the appeal.

As recited by the habeas court, the facts which the jury reasonably could have found concerning the petitioner's underlying conviction are as follows: "[T]he petitioner was charged with one count of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134, one count of larceny in the first degree in violation of General Statutes [Rev. to 2007] § 53a-122 (a) (2), and one count of conspiracy to commit larceny in the first degree in violation of . . . § 53a-48 and [General Statutes (Rev. to 2007) §] 53a-122. The petitioner, represented by Attorney Claud Chong, proceeded to a jury trial. The jury returned verdicts of guilty on all counts, finding the petitioner guilty of counts one and three as a coconspirator on the theory of vicarious liability. The petitioner appealed from the judgment of conviction; however, the appeal was withdrawn. . . .

"On Wednesday, November 21, 2007, the day before Thanksgiving, the McDonald's restaurant near the New Brite Plaza area of New Britain had been open for business. The public could enter and exit the restaurant from two doors, one at the front of the building and the other on the side, that are unlocked during business hours and are locked when the restaurant is closed. The side door latch did not work properly and tape was

placed over the latch to allow the door to open during business hours. At the end of the day, when the side door needed to be secured, the tape would be removed so that the latch would prevent the door from opening.

"Shortly before midnight, when both the inside of the restaurant and the drive-through window stopped transacting business, the employees then on-site prepared to close the restaurant. Among those employees were Assistant Manager Angel Echevarria and Bethza Meletrich. Echevarria's responsibilities at closing included collecting the eight cash register drawers in a safe located in a small office in the back of the restaurant. The proceeds from the day's sales, gift cards, coupons, the register drawers themselves with $100 of start-up money for the next business day and any other valuables would be secured in the safe. The cash proceeds from sales and gift cards were placed in bank deposit bags and then secured inside the back office safe.

"Although it was normally Echevarria's responsibility to lock the two outside doors, on the evening of November 21, 2007, he was training another manager to count the money in the registers and asked Bethza Meletrich to lock the two outside doors. Although Bethza Meletrich initially locked both doors, which involved removing the tape on the side door's latch, she returned to replace the tape on the side door latch. One of the restaurant's surveillance cameras shows Bethza Meletrich on her cell phone as she walked past the registers to the side door. Shortly thereafter, Bethza Meletrich walked past the registers again, and then three men, later described by Echevarria as being light skinned and of normal height and average size, who were dressed in dark hooded sweatshirts with the hoods pulled over their heads, and whose faces were concealed by dark ski masks, entered the McDonald's restaurant through the side door and made their way to the back office.

"Two of the men brandished handguns, one chrome with a wooden handle and the other black. One of the men called Echevarria by his nickname, Sidio, a name either uncommon or unique to Echevarria, but known to employees of the McDonald's, including Bethza Meletrich. After one of the men asked Echevarria where the money was located, he told them in the office safe. One of the robbers stacked either seven or eight of the register drawers and carried the stack, described by Echevarria as heavy and difficult to carry, out of the restaurant. Echevarria called 911 after the three men exited the restaurant and then went to the side door and observed a car driving away. Three of the surveillance cameras in the restaurant captured footage of the robbery.

"The police responded to the restaurant and began their investigation, which included interviewing all employees. Although Bethza Meletrich initially denied any involvement, she later gave a statement to New Britain police officers admitting her involvement in the robbery. In her statement, dated November 26, 2007, Bethza Meletrich indicated that she met Adam [Marcano] and the petitioner, whose nickname was 'Rome' or 'Romeo,' before she went to work. They asked her to leave the door open at closing time so that they could rob the restaurant. According to Bethza Meletrich, she was first offered money for her cooperation, which she declined, and then her two cousins threatened her and/or her girlfriend. Bethza Meletrich informed the police that the petitioner was armed with a silver gun that had a brown handle, which he displayed to her while it was tucked into his waistband. The petitioner and Adam Marcano, accompanied by a third person unknown to Bethza Meletrich, entered the restaurant shortly before midnight through the side door she had left unlocked.

"Also on November 26, 2007, the police executed a search warrant for one of the apartments in, as well

as the basement of, 20 Acorn Street, New Britain, a multifamily dwelling approximately six blocks, or less than one mile, from the [McDonald's] restaurant that was robbed. The petitioner was at the apartment when the police executed the search warrant. Although the Marcano brothers were not present at that time, the police found items belonging to both Adam and Anthony Marcano in the apartment. The police investigation determined that the petitioner and both Marcano brothers lived at 20 Acorn Street on the first floor.

"The police also found three black hooded sweatshirts in the apartment. After gaining access to the basement from the apartment, the police searched the basement and found: two money deposit bags, one of which contained several rolls of coins and loose quarters; a plastic bag containing three black ski masks, one pair of black fleece gloves and one pair of brown knit gloves; and three cash register drawers, one of which contained a McDonald's coupon. Subsequently, in January, 2008, the police received a phone call from the landlord of 20 Acorn Street apprising the police that other items had been found concealed under a subfloor of the basement. The police returned to 20 Acorn Street and seized five additional cash register drawers, one of which had a McDonald's sticker on it, that had been concealed under the subfloor.

"Forensic evidence recovered included [fingerprints] and palm prints from the plastic bag that contained the masks and gloves, as well as DNA from two of the ski masks. Three of the fingerprints—the right index, the right thumb, and the left thumb—were identified as belonging to Anthony [Marcano]. A DNA sample obtained from the petitioner allowed a comparison to [be] made with DNA from two of the masks. One mask interior had DNA from at least three individuals; the petitioner was determined to be a contributor to that DNA profile. As to this mask . . . an individual could be included statistically in this profile at the ratio of 1 in 120,000 African-Americans, 1 in 69,000 Caucasians

and 1 in 66,000 Hispanics. A DNA sample from another mask's exterior had DNA from at least four individuals; the petitioner was determined to be a contributor to that DNA profile. As to that mask . . . an individual could be included statistically in this profile at the ratio of 1 in 390 African-Americans, 1 in 120 Caucasians and 1 in 170 Hispanics. . . .

"The state contended that the petitioner was guilty of the robbery and larceny in the first degree charges either as a principal offender or as an accessory to another participant in the crime. Additionally, the court instructed the jury on the robbery and larceny in the first degree charges as to the theory of vicarious liability. Thus, if the jury found beyond a reasonable doubt that the state had proven all elements of the conspiracy to commit robbery and larceny in the first degree charges, but that the state had not proven that the petitioner was a principal or accessory as [to] the robbery and larceny charges in counts one and three, then the jury could consider whether the petitioner was criminally liable for the criminal acts of the other [coconspirators] under vicarious liability. The jury was charged accordingly.

"The jury returned guilty verdicts on all counts. Specifically, the jury found the petitioner guilty of both the robbery and larceny in the first degree charges as a [coconspirator] under the theory of vicarious liability. . . .

"The court, *Espinosa*, *J.*, sentenced the petitioner on February 5, 2010 [to a] . . . total effective sentence on all counts [of] twenty-three years of incarceration, followed by five years of special parole. The petitioner appealed from the judgment of conviction, but withdrew the appeal." (Footnotes omitted.)

In his seven count petition for a writ of habeas corpus, filed October 28, 2014, the petitioner claimed, inter alia,

that Chong rendered ineffective assistance by, inter alia, failing to present the testimony of Guillermina Meletrich,[1] the petitioner's aunt, at the petitioner's criminal trial.

The petitioner's habeas trial began on February 9, 2015. In its memorandum of decision of August 18, 2015, the habeas court denied the petition for a writ of habeas corpus on all counts. The petitioner then filed a petition for certification to appeal from the court's judgment, which the court denied. This appeal followed. Additional facts will be discussed as necessary.

I

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his habeas petition claiming ineffective assistance of counsel. Specifically, he argues that because the issue is debatable among jurists of reason, a court could resolve the issue differently, and, therefore, the habeas court abused its discretion in denying his petition for certification to appeal. We disagree.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an

[1] The petition for a writ of habeas corpus and the habeas court's memorandum of decision refer to her as "Guiellermo," but the habeas trial transcripts and the petitioner's appellate brief spell the name "Guillermina." She is also sometimes referred to as "Gigi." We will refer to her as "Guillermina" throughout this opinion.

abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821–22, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

As we discuss more fully in part II of this opinion, we disagree with the petitioner's claim that Chong performed deficiently by failing to call Guillermina Meletrich as an additional alibi witness during the petitioner's criminal trial; nor was the petitioner prejudiced by Chong's decision. Because the resolution of the petitioner's claim does not involve an issue that is debatable among jurists of reason, we conclude that the habeas court did not abuse its discretion in denying certification to appeal from the denial of the petition for a writ of habeas corpus.

II

We turn to the questions of whether Chong performed deficiently by failing to call Guillermina Meletrich as an additional alibi witness during the petitioner's criminal trial, and thereby prejudiced the defense. We agree with the habeas court.[2]

"We begin with the standard of review applicable to this claim. The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 686, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], [our Supreme Court] has stated: It is axiomatic that the right to counsel is

[2] The habeas court considered and rejected a number of claims brought by the petitioner. The claim regarding the failure to call Guillermina Meletrich is the only claim pursued on appeal. We note that the habeas court devoted only six lines in its memorandum of decision to the analysis of this issue. To the extent that the habeas court's precise reasoning does not appear in the record, we presume that the court's reasoning was correct. See *Water Street Associates Ltd. Partnership* v. *Innopak Plastics Corp.*, 230 Conn. 764, 773, 646 A.2d 790 (1994) ("to the extent that the trial court's memorandum of decision may be viewed as ambiguous . . . we read an ambiguous record, in the absence of a motion for articulation, to support rather than to undermine the judgment").

the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. . . . The claim will succeed only if both prongs are satisfied." (Citation omitted; internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 537–38, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016).

At the habeas trial, Guillermina Meletrich testified that she arrived home at 4:30 p.m., on November 21, 2007, and that the petitioner and his girlfriend[3] were there when she arrived. She stated that she knew that he did not leave the house that day "[b]ecause every time I came in he was there . . . ." When asked if she would have testified at the petitioner's criminal trial, she stated, "They had asked me once to testify if he was at my house that day . . . and I said he was, but they never called me." When asked if she would have testified as she did at the habeas trial, she said, "Yes, because it's the truth. He was home."

In its memorandum of decision, the habeas court made the following findings: "[Guillermina] Meletrich testified that the petitioner and his girlfriend were at the house when the robbery was committed. Given that the jury found the petitioner guilty as a coconspirator under the theory of vicarious liability, the petitioner did not need to be at or near the McDonald's restaurant when the robbery was committed. Therefore, the evidence presented by [Guillermina] Meletrich in the habeas proceeding does not show deficient performance by . . . Chong for failing to present her testimony to the jury, nor that the petitioner was prejudiced thereby." The habeas court made no findings as to whether Guillermina Meletrich was credible.

[3] The "girlfriend" referred to is Christina Diaz, who in the petitioner's criminal trial, testified as an alibi witness and referred to herself as the petitioner's ex-wife.

The petitioner argues on appeal that the habeas court incorrectly concluded that Chong's failure to call Guillermina Meletrich as an additional alibi witness did not amount to ineffective assistance. The petitioner contends that the court erred in its findings regarding Guillermina Meletrich's testimony, because her testimony provided an alibi for not only the time of the actual robbery, but also for the time when, according to Bethza Meletrich, the petitioner and Adam Marcano presented the plan to her at the park. The petitioner claims that this testimony, therefore, would have established a full alibi for not only the actual robbery, but also for the conspiracy to commit the robbery, as well, because Bethza Meletrich's testimony was the only direct testimony linking the petitioner to the conspiracy.

Having thoroughly reviewed the record, we conclude that even if the habeas court had credited Guillermina Meletrich's testimony such that the petitioner could not have confronted Bethza Meletrich in the park, Chong was still not constitutionally ineffective in failing to present Guillermina Meletrich's testimony. Chong had no compelling reason to call her, and we are also not persuaded that the outcome would have been different if her testimony had been presented.

A

"To prove his or her entitlement to relief pursuant to *Strickland*, a petitioner must first satisfy what the courts refer to as the performance prong; this requires that the petitioner demonstrate that his or her counsel's assistance was, in fact, ineffective in that counsel's performance was deficient. To establish that there was deficient performance by petitioner's counsel, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range

of reasonable professional assistance. . . . The range of competence demanded is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . .

"[J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . In reconstructing the circumstances, a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Citations omitted; internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 538–39.

"The failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense. Defense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness and that the attorney, without a reasonable investigation and

without adequate explanation, failed to call the witness at trial. The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when he was conducting it." *State* v. *Talton*, 197 Conn. 280, 297–98, 497 A.2d 35 (1985). Where an alibi defense contains omissions for crucial time periods, the alibi is insufficient, and it is not deficient performance to fail to present that defense. See *Jackson* v. *Commissioner of Correction*, 149 Conn. App. 681, 701–702, 89 A.3d 426 (2014), appeal dismissed, 321 Conn. 765, 138 A.3d 278, cert. denied sub nom. *Jackson* v. *Semple*, U.S. , 137 S. Ct. 602, 196 L. Ed. 2d 482 (2016). "[W]here the [new] evidence merely furnishes an additional basis on which to challenge [previously admitted evidence, the credibility of which] has already been shown to be questionable . . . the [new] evidence may properly be viewed as cumulative, and hence not material, and not worthy of a new trial." (Internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 787, 138 A.3d 908 (2016).

"We [note] that our review of an attorney's performance is especially deferential when his or her decisions are the result of relevant strategic analysis. . . . Thus, [a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken. . . .

"[O]ur habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, such as when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . . Further, we generally have upheld an attorney's choice

to call certain witnesses instead of others. . . .'' (Citations omitted; internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 540–42.

''We recognize, however, that there have been instances when our Supreme Court and this court have held that an attorney's failure to call specific witnesses was deficient performance.'' Id., 542. See, e.g., *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 516–20, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009); *Vazquez* v. *Commissioner of Correction*, 107 Conn. App. 181, 185–87, 944 A.2d 429 (2008); *Siano* v. *Warden*, 31 Conn. App. 94, 104–105, 623 A.2d 1035, cert. denied, 226 Conn. 910, 628 A.2d 984 (1993).

''Finally, we turn to the legal principles governing our review of the proffered testimony of the petitioner's alibi witnesses. Our Supreme Court has clarified that in Connecticut, the crux of the alibi defense is to create a reasonable doubt as to key elements of the state's case. [A]lthough an alibi is sometimes spoken of as a defense, it operates, in this state, to entitle an accused to an acquittal when he has so far proved his alibi that upon all the evidence a reasonable doubt of his guilt has been raised. . . . Circumstantial evidence can be used to support, or disprove, an alibi defense. . . .

''[A]bsent a sufficient tactical reason, the failure to call an alibi witness can constitute deficient performance. . . . Where the proffered witnesses would fail to account sufficiently for a defendant's location during the time or period in question, however, a failure to present certain alibi witnesses has been upheld as reasonable under the circumstances.'' (Citations omitted; internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 544–46.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012).[4]

The following facts from the petitioner's habeas and criminal trials are pertinent to our analysis. At the petitioner's habeas trial, the petitioner testified that he told Chong that he had several alibi witnesses, including Guillermina Meletrich and Christina Diaz. Chong testified that he could not "recall the names of the relatives, but [he] did speak to a number of the relatives . . . ." He did "recall speaking to an aunt who lived at [20 Acorn Street]," but could not recall specific names. When asked if he recalled speaking to an aunt who said the petitioner was home during the day and evening of

[4] We note as well that appellate courts, and habeas courts, are not necessarily compelled to reach a conclusion of ineffective deficient performance if trial counsel has not called as a witness a person who can provide useful information. See *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 302–304, 979 A.2d 507, cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009) (counsel not ineffective for failing to call alibi witness when witness was not strong and others were available). Experienced trial counsel are well aware that virtually every witness has vulnerabilities, or would provide information on cross-examination that could favor his opponent. See *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 637–38, 126 A.3d 558 (2015) (counsel not ineffective for failing to call "highly credible" expert witness because his "opinion would have been vulnerable to attack on various grounds"). As a criminal defendant is protected to a degree by the burden of proof, a choice not to call witnesses who are not crucial may be wise. See *Harrington* v. *Richter*, 562 U.S. 86, 111, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) ("[w]hen defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the [s]tate's theory for a jury to convict").

the robbery, Chong said, "It's possible, but again . . . as to specific conversations, I don't recall." After being presented with a police report, Chong said, "Again, I don't remember names, but I do remember, prior to trial, during the course of conducting the investigation, I—myself and my investigator did speak to a number of family members and friends . . . ." He continued, "A number of family and friends were staying at that residence in New Britain, and we spoke with a number of family and friends to establish an alibi for [the petitioner]. . . . I . . . recall that a girlfriend claimed that she was in bed with [the petitioner] at the time of the McDonald's . . . robbery, and she in fact testified at the trial to provide an alibi defense. I'm sure I spoke to other relatives, but it was my judgment at the time that she would provide the best testimony with respect to his whereabouts at the time of the robbery." When questioned about whether having additional alibi witnesses would have bolstered the defense of the petitioner, Chong could not answer, stating it required speculation, and he reiterated that "after interviewing a number of family members and friends who were at the residence, people were coming and going and family . . . members could not account for his presence every hour, every minute of the day and night. The only person who could testify in my judgment and provide the strongest testimony was the girlfriend who said . . . that she was in bed with him at the . . . specific time that the robbery occurred . . . ." After being asked again if presenting additional alibi witnesses would have helped, Chong again could not answer, and the habeas court intervened, calling the petitioner's habeas counsel argumentative. Chong then said that he remembered an aunt who said the petitioner was at the house the day of the robbery, but could not account for his whereabouts within the specific time frame of the robbery's commission. When asked if he knew what time

Guillermina Meletrich could provide an alibi for, Chong stated, "No, no. It's . . . important to understand . . . that . . . the McDonald's restaurant was within a five minute drive from the home."

The criminal trial record reflects that Christina Diaz did testify as an alibi witness for the petitioner. She testified that she arrived at 20 Acorn Street on November 21, 2007, during daylight hours, and was with the petitioner for every moment. She said he did not leave the house, and that she did not recall him slipping out.

On all the evidence and facts found by the court, we conclude that Chong's representation was not deficient by failing to call Guillermina Meletrich as an alibi witness. Although Guillermina Meletrich testified that the petitioner was home the entire time from 4:30 p.m. onward, it was also clear that she was not with him every moment of that time frame. She said, "[e]very time I came in he was there," implying, of course, that there were times when she was not physically with him. Given the close proximity of the McDonald's, as evidenced by Chong's testimony at the habeas trial and Bethza Meletrich's testimony at the criminal trial, it would have been reasonable for the jury to infer that the petitioner could have left the house to confront Bethza Meletrich on her way to work without Guillermina Meletrich's knowledge.

Guillermina Meletrich's testimony also would have been cumulative of that of Diaz. Diaz testified at the criminal trial that she had been with the petitioner every moment from the time she arrived until after the robbery. Guillermina Meletrich stated that Diaz was with the petitioner when she came to see him. Finally, Chong, who did not remember every detail, testified nonetheless that he or his investigator interviewed several friends and family members and thought Diaz could

provide the best alibi because she could cover the petitioner's whereabouts at the time of the robbery. Diaz testified at the criminal trial that she was with the petitioner continuously from before sunset, which necessarily covered the time when Bethza Meletrich, according to her testimony, was confronted by the petitioner and Adam Marcano. We conclude that the petitioner has not shown that Chong's investigation and trial strategy were deficient by reason of his not presenting cumulative testimony that would have been less comprehensive than that of Diaz.[5]

B

To prevail on a claim of ineffective assistance of counsel, a petitioner must show both deficient performance and prejudice; a failure to prove either deficient performance or prejudice is fatal to his or her claim. *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 510. Although we have determined that the habeas court did not err in finding that the petitioner did not prove deficient performance by Chong, we also find that the habeas court did not err in finding that his performance did not satisfy the prejudice prong of *Strickland*. See *Strickland* v. *Washington*, supra, 466 U.S. 691–96.

[5] We note that the petitioner has asserted that the court's factual finding was erroneous in stating that Guillermina Meletrich "testified that the petitioner and his girlfriend were home with her at the time of the robbery," and in concluding that because the petitioner was convicted as a coconspirator, "the petitioner did not need to be at or near the McDonald's restaurant when the robbery was committed." The petitioner claims that this finding shows that the court mistakenly found that the aunt's alibi testimony did not cover the time that Bethza Meletrich was confronted in the park. A more accurate characterization is that the court was simply silent as to the time when Bethza Meletrich was confronted. Even were we to accept the petitioner's claim of factual error, we nonetheless would not conclude that Chong's performance was deficient, for reasons previously stated.

Additionally, the claim that the petitioner could not have been a coconspirator if he did not confront Bethza Meletrich in the park is not persuasive. We discuss the issue more fully in part II B of this opinion.

"Our analysis of the prejudice prong requires us to determine the probable effect that counsel's alleged defective performance had under the circumstances of the case before the court. Thus, [t]o satisfy [this] prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. . . . The likelihood of a different result must be substantial, not just conceivable. . . .

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the . . . jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. . . . [I]n assessing whether there is a substantial likelihood that the addition of such evidence would

have resulted in a different outcome, we must consider the cumulative effect of all of the evidence. . . .

"[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. . . . The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (Citations omitted; internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 565–66.

As discussed in part II A of this opinion, Guillermina Meletrich's testimony was cumulative of that provided by Diaz at the criminal trial. We are not persuaded that the addition of Guillermina Meletrich's testimony would have reasonably affected the jury's verdict. Among other considerations, neither witness was entirely neutral and disinterested. See *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 518 ("in circumstances that largely involve a credibility contest . . . the testimony of neutral, disinterested witnesses is exceedingly important" [internal quotation marks omitted]).

Furthermore, Guillermina Meletrich's testimony did not provide the petitioner with an airtight alibi, even as to the time Bethza Meletrich was approached in the park. More critically, the jury could have believed Diaz' testimony to the effect that the petitioner was in the house with her from when she arrived, and the petitioner still could have conspired to commit the robbery; the plan could have been devised at an earlier time and executed later.[6] Bethza Meletrich testified that the

[6] The prohibited act in the conspiracy context is the agreement, not the substantive crime. See, e.g., *State* v. *Pond*, 315 Conn. 451, 472–75, 108 A.3d 1083 (2015). The petitioner asserts that the only evidence of the timing of the agreement indicates that the agreement was made when the plan was announced to Bethza Meletrich in the park. There is no logical reason, however, why the jury could not have fully believed Diaz—and thus Guillermina Meletrich's information would have had no additional value—and also

petitioner and Adam Marcano approached her with a preformed plan; the jury reasonably may have inferred that the petitioner and Adam Marcano formed their plan prior to the confrontation with Bethza Meletrich. Thus, our confidence in the verdict has not been undermined by the failure to present Guillermina Meletrich's testimony.

In summary, the petitioner is unable to demonstrate that he was prejudiced by Chong's failure to call Guillermina Meletrich as an alibi witness. Consequently, as he has failed to demonstrate either deficient performance or prejudice, the petitioner's claim of ineffective assistance of counsel must fail. In light of the foregoing, the habeas court did not abuse its discretion in denying the petition for certification to appeal for this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

GMAC MORTGAGE, LLC *v.* ERIC M. FORD ET AL.
(AC 38712)

Alvord, Sheldon and Mullins, Js.*

Syllabus

The plaintiff G Co. sought to foreclose a mortgage on certain real property previously owned by the defendant F. In its complaint, G Co. alleged that it was the holder of a promissory note that was secured by a mortgage on the subject property and that F was in default of his obligation under the note. The trial court granted G Co.'s motion for summary judgment and rendered a judgment of strict foreclosure, from

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have found that the petitioner agreed at a prior time to commit the robbery. This inference is supported by the charges brought against the petitioner at his criminal trial. The information charged the petitioner with four counts, each of which occurred "on *or about*" the date of the robbery, which means the conspiracy did not have to form precisely during Bethza Meletrich's walk to work for the jury to find the petitioner guilty. (Emphasis added.)

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

which F appealed to this court, which affirmed the judgment and remanded the case to the trial court for the purpose of setting new law days. On remand, G Co. filed a motion to substitute W Co., as trustee for the H trust, as the plaintiff, alleging that W Co. was the real party in interest, as it had acquired the right to collect the debt due on the subject note through G Co.'s assignment of the mortgage to it. F did not object to the substitution, and the trial court granted the motion. Thereafter, W Co. filed a motion to open the judgment of strict foreclosure for the purpose of setting new law days. In his opposition to the motion to open, F argued, inter alia, that, pursuant to *Jesinoski* v. *Countrywide Home Loans, Inc.* (135 S. Ct. 709), which held that if a borrower notifies his creditor of his intention to rescind a loan within three years after the loan is consummated, the rescission is timely under the Truth in Lending Act (15 U.S.C. § 1601 et seq.), he had not defaulted on the note and mortgage because he had exercised his right to rescind the loan by mailing to G Co. a notice of right to cancel within the statutory rescission period. The trial court granted W Co.'s motion to open the judgment of strict foreclosure and set new law days. Prior to the trial court's ruling on W Co.'s motion to open, F had filed a motion to open the judgment, arguing that the judgment should be opened because *Jesinoski* had overruled any conclusion by this court in his prior appeal that his rescission of the loan was not effective under the Truth in Lending Act. The trial court denied F's motion to open the judgment, and F appealed, challenging the trial court's rulings on the parties' respective motions to open the judgment. *Held*:

1. F could not prevail on his claim that the trial court erred in granting W Co.'s motion to open the judgment of strict foreclosure for the purpose of setting new law days and denying his motion to open the judgment: F's reliance on *Jesinoski* to support his claim was misplaced, as that case did not stand for the proposition that his purported rescission of the subject loan was effective as a matter of law to forestall the foreclosure action simply because he alleged that he had mailed a notice of right to cancel to G Co. within three years of the loan's consummation, and, therefore, *Jesinoski* was inapplicable to the facts of the present case, and the trial court did not abuse its discretion in granting W Co.'s motion to open the judgment for the purpose of setting new law days.
2. F's claim that W Co. lacked standing to maintain the foreclosure action because the H trust did not legally exist was unavailing: F presented no competent evidence, either at the time of the unopposed substitution of W Co. as the plaintiff or on appeal, that the H trust had no legal existence, nor any proof to rebut G Co.'s jurisdictional allegations in its complaint that it was the holder of the subject note and mortgage when it commenced the action; moreover, because a substitute plaintiff stands in the shoes of the original plaintiff, the court was entitled to take the facts alleged in the complaint, as augmented by the facts alleged

in the motion to substitute, and to conclude that W Co.'s standing had been established on that basis.

Argued September 11—officially released November 28, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant Ali Shah Bey, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hartmere*, *J.*, denied the named defendant's motion to dismiss; thereafter, the court, *Hon. Edward F. Stodolink*, judge trial referee, granted the plaintiff's motion for summary; subsequently, the court, *Hartmere*, *J.*, rendered a judgment of strict foreclosure, and the named defendant appealed to this court, which affirmed the judgment and remanded the case for the purpose of setting new law days; thereafter, Wells Fargo Bank, N.A., as Trustee for Harborview Mortgage Loan Trust 2006-10 was substituted as the plaintiff; subsequently, the court, *Hon. Alfred J. Jennings*, *Jr.*, judge trial referee, granted the substitute plaintiff's motion to open the judgment and extend the law days; thereafter, the court, *Hon. Edward F. Stodolink*, judge trial referee, denied the named defendant's motion to open the judgment, and the named defendant appealed. *Affirmed.*

Eric M. Ford, self-represented, the appellant (named defendant).

Marissa I. Delinks, for the appellee (substitute plaintiff).

Opinion

ALVORD, J. The self-represented defendant in this residential mortgage foreclosure action, Eric M. Ford,[1]

[1] Ali Shah Bey is also named as a defendant in this action, but has not participated in the appeal. For this reason, we refer to Ford as the defendant throughout this opinion.

appeals[2] from the judgment of the trial court granting the motion of the plaintiff Wells Fargo Bank, N.A., as Trustee for Harborview Mortgage Loan Trust 2006-10 (Wells Fargo),[3] to open a judgment of strict foreclosure and to extend the law days, and denying the defendant's motion to open the judgment. On appeal, the defendant claims that (1) in light of the United States Supreme Court's decision in *Jesinoski* v. *Countrywide Home Loans, Inc.*, U.S. , 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015), the trial court erred in granting the plaintiff's motion to open and denying his motion to open; and (2) the plaintiff lacks standing to maintain this action. We affirm the judgment of the trial court.

We adopt, in relevant part, the following facts and procedural history set forth in this court's opinion in *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 73 A.3d 742 (2013) (*Ford I*): "In July, 2006, the defendant executed a note in the amount of $177,000 along with a mortgage on property located at 123 Roosevelt Street in Bridgeport (subject property) as security for the note. On March 15, 2010, the plaintiff commenced this action, alleging that the defendant had defaulted on his payment obligations under the note and had failed to cure the default after being notified, and that the plaintiff had exercised its right to accelerate the balance due, to declare the note due in full and to foreclose the

[2] This is the third appeal stemming from this foreclosure action. The defendant filed the first appeal in November, 2011. This court dismissed that appeal for failure to comply with Practice Book § 63-4 requirements. The defendant filed the second appeal in June, 2012. This court affirmed the judgment of strict foreclosure. *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 73 A.3d 742 (2013). The second appeal will be discussed further throughout this opinion.

[3] GMAC Mortgage, LLC (GMAC), was the original plaintiff in this action, as holder of the promissory note secured by the mortgage to be foreclosed by this action. The mortgage was assigned to the Wells Fargo Bank, N.A., as Trustee for Harborview Mortgage Loan Trust 2006-10 on October 1, 2014, and GMAC successfully moved to substitute Wells Fargo as the plaintiff.

mortgage securing the note. The defendant filed an appearance in this matter on August 19, 2010.

* * *

"On April 18, 2011, the plaintiff filed a motion for summary judgment. . . . The defendant filed a two page objection to the motion for summary judgment on May 31, 2011. On June 9, 2011 . . . [t]he defendant . . . filed an amended opposition to the motion for summary judgment . . . . The defendant did not submit any opposing affidavits or other documentary proof in support of his original or amended oppositions. . . . On July 28, 2011, the parties appeared before the court to argue the plaintiff's motion for summary judgment, and, following a brief hearing, the court orally granted the motion.

* * *

"On May 7, 2012, the plaintiff filed a motion for a judgment of strict foreclosure. The motion was heard by the court on May 29, 2012. After brief arguments by the parties, the court granted the motion orally, making all the necessary factual findings and setting law days to commence on August 28, 2012." (Footnotes omitted.) Id., 168–72. On June 20, 2012, the defendant appealed from the judgment of strict foreclosure to this court, arguing, inter alia, that the trial court improperly granted the plaintiff's motion for summary judgment as to liability on the foreclosure complaint and rendered a judgment of strict foreclosure. Id., 168. On July 16, 2013, this court affirmed the judgment of the trial court and remanded the case for the purpose of setting new law days. Id., 187.

On May 20, 2015, on remand, GMAC moved to substitute Wells Fargo as the plaintiff pursuant to Practice Book §§ 9-16 and 9-23. In its memorandum of law in support of this motion, GMAC argued that Wells Fargo

was the real party in interest, as it had acquired the right to collect the debt due on the loan in foreclosure through an assignment of the mortgage. GMAC attached a copy of the assignment of the mortgage to its memorandum. The defendant did not object to the substitution, and the trial court, *Hon. Richard P. Gilardi*, judge trial referee, granted the motion to substitute on June 8, 2015.

On July 9, 2015, the plaintiff moved to open the judgment of strict foreclosure for the purpose of setting new law days. The defendant objected, arguing, inter alia, that (1) this court did not rule on all of his issues in his prior appeal, (2) he "did not default on the alleged note and mortgage" in 2009 because he "exercised his federal right to cancel under the Truth in Lending Act" (TILA), 15 U.S.C. § 1601 et seq.,[4] and (3) the issue of standing, raised by the plaintiff,[5] was never resolved. In his objection, the defendant cited *Jesinoski* for the first time.

On July 27, 2015, the defendant filed a supplemental objection to the plaintiff's motion to open the judgment. He primarily argued that he rescinded his loan within the statutory rescission period because *Jesinoski* "clarified that a TILA rescission disputed or undisputed is effectuated at the moment the notice of right to cancel is timely mailed within three years of the loan date

[4] TILA provides to a borrower the unconditional right to rescind a loan within three days of the loan's consummation. See 15 U.S.C. § 1635 (a). The right to rescind pursuant to TILA may be extended for up to three years, but only if a lender fails to make certain required disclosures to the borrower. See 15 U.S.C. § 1635 (f).

[5] In response to a motion to dismiss filed by the defendant, the plaintiff raised the issue of standing in anticipation of a challenge by the defendant. *Ford I*, supra, 144 Conn. App. 169. The plaintiff contended that it was in possession of the original note before the action commenced and, thus, had standing to foreclose the mortgage securing the note. Id. On January 21, 2011, for the reasons stated in the plaintiff's opposition, the court denied the defendant's motion to dismiss. Id.

. . . .'' The supplemental objection referred to a notice of right to cancel, signed and sworn to by the defendant on July 10, 2009, which was recorded in the Bridgeport land records on September 29, 2009. The defendant previously had filed this notice with the trial court on June 20, 2011, but did not attach a copy to his supplemental objection. On October 13, 2015, the trial court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, overruled the defendant's objections and granted the plaintiff's motion to open the judgment. The court set new law days, pursuant to this court's remand order, to commence on November 17, 2015.

However, on November 2, 2015, the defendant filed a motion for reargument. On November 20, 2015, the plaintiff objected to this motion, claiming that reargument was not warranted because the defendant had not alleged some principle of law that would have a controlling effect but was overlooked by the court, nor were there claims of law that the court had failed to address. On December 8, 2015, the trial court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, denied the defendant's motion for reargument.

During this period of time, on October 9, 2015, the defendant moved to open the judgment, citing ''evidence to submit that lends to my defense.'' The plaintiff objected to this motion, arguing that the defendant was engaging in dilatory behavior in an attempt to delay the foreclosure. On November 13, 2015, the defendant filed a memorandum to ''supplement . . . defendant's motion to open,'' in which he argued that *Jesinoski*, which the Supreme Court decided subsequent to this court's decision in *Ford I*, overruled any conclusion by this court that his alleged TILA rescission was not effective. He also filed an affidavit, to which he attached the July 10, 2009 notice of right to cancel. After a brief hearing on November 17, 2015, the trial court, *Hon. Edward F. Stodolink*, judge trial referee, denied the

defendant's motion to open the judgment and sua sponte set new law days to commence on December 8, 2015.

On December 7, 2015, the defendant filed an additional motion to reargue, a motion for articulation, and a motion to dismiss.[6] On December 14, 2015, the defendant filed this appeal.[7]

I

The defendant first argues that on remand, the trial court erred in granting the plaintiff's motion to open the judgment of strict foreclosure, and denying his motion to open the judgment. Specifically, the defendant argues that, based on *Jesinoski*, "a TILA notice is effective as long as it is in writing and is mailed to a creditor within three years from the consummation of the loan." Thus, he claims that his alleged rescission of the loan was effective as a matter of law in this foreclosure action, and that the trial court erred in ruling on the motions at issue without considering the effect of *Jesinoski*.[8] We disagree.

We begin by setting forth the applicable standard of review. We review a trial court's ruling on motions to

[6] The trial court has not ruled on these motions.

[7] The defendant first appealed to our Supreme Court, and the appeal subsequently was transferred to this court.

[8] The defendant also argues that, in light of *Jesinoski*, this court must revisit its decision in *Ford I*. He claims that *Jesinoski* declares his TILA rescission effective as a matter of law. Accordingly, he argues that the burden of proof at summary judgment should have been placed on the plaintiff, as the movant, to disprove the effectiveness of his TILA rescission, and that in affirming the trial court's summary judgment and judgment of strict foreclosure, this court decided that his TILA rescission was ineffective—a decision that "conflicts with the [United States] Supreme Court." We reject this argument for two reasons. First, *Jesinoski* does not apply to the facts of this case. Second, the defendant has appealed to this court seeking review of the trial court's judgment granting the plaintiff's motion to open and denying the defendant's motion to open, not whether this court's decision in *Ford I* is proper in light of *Jesinoski*.

open under an abuse of discretion standard. *Valentine* v. *LaBow*, 95 Conn. App. 436, 451, 897 A.2d 624, cert. denied, 280 Conn. 933, 909 A.2d 963 (2006). Under this standard, we give every reasonable presumption in favor of a decision's correctness and will disturb the decision only where the trial court acted unreasonably or in a clear abuse of discretion. Id. "As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) Id., 451–52.

Pursuant to General Statutes § 49-15 (a) (1), a trial court may, at its discretion, open and modify a judgment of strict foreclosure upon written motion of any person having an interest in the judgment and for cause shown. "Because opening a judgment is a matter of discretion, the trial court [is] not required to open the judgment to consider a claim not previously raised. The exercise of equitable authority is vested in the discretion of the trial court and is subject only to limited review on appeal. . . . In light of the extremely deferential standard of review governing the disposition of new claims raised posttrial and without the benefit of the trial court's reasoning as to those claims . . . the defendant's arguments are entitled to brief consideration only." (Internal quotation marks omitted.) *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, 171 Conn. App. 842, 849, 158 A.3d 405 (2017).

The defendant's reliance on *Jesinoski* to support his objection to the plaintiff's motion to open the judgment of strict foreclosure, and his motion to open the judgment, is misplaced. In *Jesinoski*, a unanimous United States Supreme Court resolved a split among the federal circuit courts as to whether a borrower exercising his right to rescind a loan pursuant to TILA must file an action before the three year period elapses, or whether he may merely provide written notice to the lender during that time. *Jesinoski* v. *Countrywide Home*

Loans, *Inc.*, supra, 135 S. Ct. 791. The petitioners, the Jesinoskis, refinanced the mortgage on their home by borrowing $611,000 from the respondent Countrywide Home Loans, Inc. (Countrywide). Id. Exactly three years after consummating the loan, the Jesinoskis mailed Countrywide and the respondent Bank of America Home Loans, which had acquired Countrywide, a letter purporting to rescind the loan. Id. After the respondent Bank of America Home Loans refused to acknowledge the validity of the rescission, the Jesinoskis filed an action in federal district court, seeking a declaration of rescission and damages. Id. The action was filed four years and one day after the consummation of the loan. Id. The District Court, concluding that TILA requires a borrower seeking rescission to file an action within three years of the loan's consummation, rendered judgment on the pleadings in favor of the respondents. Id. The United States Court of Appeals for the Eighth Circuit affirmed the judgment. Id. Relying on the language of TILA, the Supreme Court concluded that "[t]he language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind." Id., 792. The court held that "so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years." Id. The court reversed the judgment of the Eighth Circuit affirming the dismissal of the complaint and remanded the case for further proceedings. Id., 793.

Contrary to the defendant's arguments, *Jesinoski* does not stand for the proposition that, as a matter of law, his purported TILA rescission was effective to discontinue this foreclosure action simply because he contended that he mailed the notice of right to cancel within three years of the loan's consummation. *Jesinoski* resolved the issue of whether a borrower was required to mail notice and to file an action, as opposed to only mailing notice, within three years of the loan's

consummation to effectuate a TILA rescission. That case was about the means by which a borrower may provide notice of rescission under TILA, not whether evidence of merely mailing a notice of right to cancel conclusively establishes rescission in a foreclosure action.[9] The defendant here misunderstands *Jesinoski*'s effect, and essentially argues that simply alleging the mailing of a rescission notice is sufficient to forestall a foreclosure action.[10] This is not so. On the basis of the foregoing, particularly *Jesinoski*'s clear inapplicability to the facts of this case,[11] we conclude that the court did not abuse its discretion in granting the plaintiff's motion to open the judgment of strict foreclosure

[9] Although we do not reach the merits of the defendant's arguments regarding the requirements of a TILA rescission, we note that a TILA rescission within the three year statutory period also requires that "the information and forms required under this section or any other disclosures required under this part have not been delivered" to the borrower. 15 U.S.C. § 1635 (f); see also *Jesinoski* v. *Countrywide Home Loans, Inc.*, supra, 135 S. Ct. 792 ("[the TILA] regime grants borrowers an unconditional right to rescind for three days, after which they may rescind only if the lender failed to satisfy the Act's disclosure requirements"). Where a defendant in a foreclosure action alleges a TILA rescission within three years of the loan's consummation date, the issue is whether the defendant was entitled to the three year rescission period because he did not receive the required disclosures, not merely whether the defendant mailed the notice within the three year period.

[10] The defendant argues that the mailing of a rescission notice, whether disputed by the lender or undisputed, is sufficient. Specifically, he claims that "*Jesinoski* shows that the presence of a disputed claim has no bearing on the effectiveness of a TILA notice." This language from the Supreme Court's opinion was in response to an argument advanced by the respondents that, although written notice of rescission would suffice for undisputed claims, an action would be required, in addition to written notice, where the parties disputed the adequacy of the disclosures. *Jesinoski* v. *Countrywide Home Loans, Inc.*, supra, 135 S. Ct. 792. The Supreme Court's conclusion that "[s]ection 1635 (a) nowhere suggests a distinction between disputed and undisputed rescissions, much less that a lawsuit would be required for the latter;" id.; is of no significance to the facts of the present case.

[11] The plaintiff argues that *Jesinoski* does not apply retrospectively to this action. The defendant responds that the plaintiff waived this argument by failing to raise it before the trial court and, alternatively, that *Jesinoski* would apply to the facts of his case because it was pending when the decision was released. Because we conclude that *Jesinoski* does not apply to the facts of this case, we decline to address these arguments.

for the purpose of setting new law days and denying the defendant's motion to open the judgment.[12]

II

The defendant next calls our attention to the plaintiff's standing to maintain this action. Specifically, the defendant argues for the first time to this court that the Harborview Mortgage Loan Trust 2006-10 does not legally exist, and, therefore, Wells Fargo Bank, N.A., as Trustee for Harborview Mortgage Loan Trust 2006-10, lacks standing to sue. We disagree, as the defendant has suggested no competent evidence, either at the time of the unopposed substitution of Wells Fargo as the plaintiff[13] or now, that the Harborview Mortgage Loan Trust 2006-10 "has no legal existence."

We are guided by the general principles governing a trial court's disposition of a motion to dismiss that challenges jurisdiction. Where, as here, "the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional

[12] The defendant also argues the significance of the facts that the plaintiff's complaint listed, as a possible encumbrance to title, the rescission notice filed in the Bridgeport land records, and that the plaintiff has not denied receiving the rescission notice. These arguments are immaterial to this appeal. The defendant argued rescission before the trial court. The trial court granted the plaintiff's motion for summary judgment and entered a judgment of strict foreclosure, which this court affirmed, concluding that "[t]he defendant presented no documentary evidence or other proof to support his allegations that the note and mortgage were properly rescinded in accordance with [TILA]." *Ford I*, supra, 144 Conn. App. 178. The only new element of the defendant's argument is *Jesinoski*. In light of *Jesinoski*'s inapplicability to this case, we need not consider these arguments. To the extent that the defendant also argues that his constitutional rights have been violated, that this litigation has been unfair, and that it would be "manifest injustice" if this court does not overturn *Ford I*, those arguments likewise need not be considered in light of our reading of *Jesinoski*.

[13] As noted in footnote 3 of this opinion, GMAC was the original plaintiff in this action and successfully moved to substitute Wells Fargo as the plaintiff.

allegations therein." (Internal quotation marks omitted.) *Rocky Hill* v. *SecureCare Realty, LLC*, 315 Conn. 265, 278, 105 A.3d 857 (2015). Here, the defendant has presented no proof to rebut the plaintiff's jurisdictional allegations in its complaint that it is "the holder of [the] note and mortgage." See, e.g., *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 150, 125 A.3d 262 (2015) (because defendant provided no proof that holder of note was not owner of debt, defendant had not rebutted presumption that as holder of note, plaintiff had standing to foreclose); see also *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 133–35, 74 A.3d 1225 (2013) ("The production of the note establishes [the plaintiff's] case prima facie against the makers and he may rest there. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff's rights." [Internal quotation marks omitted.]). The substituted plaintiff stands in the shoes of the original plaintiff, and a court is entitled to take the facts alleged in the complaint, as augmented by the facts alleged in the motion to substitute, and to conclude that standing has been established on that basis. Accordingly, the defendant's jurisdictional claim fails.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

LUIS LEBRON *v.* COMMISSIONER OF CORRECTION
(AC 39286)

Keller, Prescott and Kahn, Js.*

Syllabus

The petitioner, who previously had been convicted, on a guilty plea, of the crimes of manslaughter in the first degree with a firearm and conspiracy

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

to tamper with a witness, and had filed two petitions for a writ of habeas corpus, filed a third petition for a writ of habeas corpus, claiming, inter alia, that he had received ineffective assistance from S and C, his trial counsel, as well as D and K, his counsel in his first and second habeas matters, respectively. Prior to the petitioner's plea, S was granted permission to withdraw on the ground that he could be called as a witness at trial. The petitioner indicated to the court that he waived any conflict, and wanted to proceed to trial and was prepared to represent himself, which the court did not allow. The petitioner thereafter was charged with additional crimes in a separate docket, and C was appointed to represent him on all of the charges, after which the petitioner entered his plea. In the first habeas action, the petitioner alleged that S and C had rendered ineffective assistance. The habeas court denied the petition, and D failed to file a timely petition for certification to appeal. In the second habeas action, in which the petitioner alleged that S, C and D had provided ineffective assistance, the habeas court rendered judgment restoring the petitioner's appellate rights with respect to the issues raised in the first habeas petition. The petitioner thereafter appealed from the denial of his first habeas petition, but did not raise the merits of his claims in that first petition against S and C. This court affirmed the judgment of the first habeas court. After the petitioner filed his third habeas petition, which included six counts, the habeas court issued notice to the parties that it would consider whether there was good cause for trial on any of the counts that the petitioner had raised in his petition. The court invited the parties to submit briefs and exhibits as to whether the petitioner's guilty plea operated as a waiver of his right to pursue the first four counts of his habeas petition. The habeas court concluded that there was no good cause for trial as to any count of the petition and rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. He claimed, inter alia, that the habeas court improperly relied in part on an affirmative defense that the respondent, the Commissioner of Correction, had not pleaded in his return in concluding that the petitioner had waived certain counts by entering a guilty plea in the criminal proceedings. *Held*:

1. The habeas court properly dismissed the first three counts of the habeas petition for lack of good cause to proceed to trial, that court having determined that the claims raised in those counts were waived as a result of the petitioner's guilty plea: the claims in counts one and two regarding the decisions of the criminal trial court to grant S's motion to withdraw as counsel and to prohibit the petitioner from representing himself involved actions that occurred prior to when the petitioner decided to enter the guilty plea at a time when he was represented by C, the petitioner never sought to withdraw his plea, nor did he challenge the voluntariness of the plea or any aspect of the criminal court's subject matter jurisdiction, and the petitioner did not direct this court to any

evidence submitted to the habeas court that, if presented at trial, would overcome the respondent's affirmative defense of waiver; furthermore, the claims in count three of the petition, which focused on the alleged ineffective assistance of S, also related to matters that occurred prior to the petitioner's decision to enter a guilty plea, the petitioner failed to establish a sufficient interrelationship between the claims he directed at S and his decision to plead guilty, and the assertion that the petitioner would have proceeded to trial and would not have pleaded guilty if S had been allowed to continue as counsel was nothing more than speculation.

2. The petitioner could not prevail on his claim that the habeas court improperly dismissed the fourth count of the habeas petition on the basis of the same waiver theory that it employed to dismiss counts one through three when that theory had not been asserted by the respondent as a special defense to count four; the habeas court, which never mentioned that its decision was premised on waiver that resulted from the petitioner's having pleaded guilty, dismissed count four on the ground that it was a successive petition, as the claim raised therein concerning the ineffective assistance of C was based on the same ground raised in the petitioner's first habeas petition that was denied, and the petitioner advanced no arguments as to why this court should overturn the habeas court's determination that count four amounted to an improper successive petition.

3. The habeas court improperly determined, in part, that there was no good cause to allow the fifth and sixth counts to proceed to trial, as the court's conclusion that none of the petitioner's claims had a direct relationship to the validity of the plea itself was improper with respect to certain allegations against C: although that court properly dismissed those portions of counts five and six that were premised on the alleged ineffective assistance of D and K with respect to the claims that were asserted in counts one through three of the habeas petition, which had been waived by the petitioner's guilty plea, that analysis did not apply to the ineffective assistance claim against C in count four, which related in part to the voluntariness of the petitioner's guilty plea, as the issues of whether D was ineffective in handling the claims against C and whether K provided ineffective assistance with respect to the allegations in count five against D were never raised or litigated fully in a previous action, the respondent failed to raise any defenses to those counts in his return, and the habeas court's rationale for dismissing counts five and six in their entirety lacked support in the record, which supported a conclusion that at least a portion of the petition had a sufficient basis in both fact and law to proceed to a trial.

Argued September 8—officially released November 28, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of

Tolland, where the court, *Sferrazza*, *J.*, following a preliminary hearing, dismissed the petition and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court. *Reversed in part; further proceedings.*

Vishal K. Garg, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Randall S. Bowers*, former deputy assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Luis Lebron, appeals from the judgment of the habeas court dismissing his third petition for a writ of habeas corpus pursuant to General Statutes § 52-470 (b).[1] The petitioner claims on appeal that, in reaching its determination that no good cause existed to proceed to trial, the habeas court improperly concluded that he had waived many of his claims by entering a guilty plea in the underlying criminal action and relied in part on an affirmative defense that was not pleaded by the respondent, the Commissioner of Correction, in his return. We conclude that the habeas court properly dismissed counts one through four of the petition, but improperly dismissed the

[1] General Statutes § 52-470 (b) provides in relevant part: "(1) After the close of all pleadings in a habeas corpus proceeding, the court, upon the motion of any party or, on its own motion upon notice to the parties, shall determine whether there is good cause for trial for all or part of the petition.

"(2) With respect to the determination of such good cause, each party may submit exhibits including, but not limited to, documentary evidence, affidavits and unsworn statements. . . .

"(3) . . . If the petition and exhibits do not establish such good cause, the court shall hold a preliminary hearing to determine whether such good cause exists. If, after considering any evidence or argument by the parties at such preliminary hearing, the court finds there is not good cause for trial, the court shall dismiss all or part of the petition, as applicable."

entirety of counts five and six. Accordingly, we affirm in part and reverse in part the judgment of the habeas court.

The relevant facts and procedural history underlying this appeal are set forth in the habeas court's memorandum of decision as well as in this court's decision resolving the petitioner's previous habeas appeal. See *Lebron* v. *Commissioner of Correction*, 108 Conn. App. 245, 947 A.2d 349, cert. denied, 289 Conn. 921, 958 A.2d 151 (2008). The petitioner initially was arrested in May, 1997, and charged with one count each of murder in violation of General Statutes § 53a-54a (a) and criminal use of a firearm in violation of General Statutes § 53a-216.[2] The petitioner was appointed a public defender, Attorney Kenneth Simon. Simon represented the petitioner through the start of jury selection, which began in January, 1999. At about that time, Simon filed a motion for permission to withdraw his appearance on the ground that he could be called as a witness at trial for the petitioner.[3] The court granted the motion.

At that time, the court discussed with the petitioner how the matter should proceed in light of defense counsel's withdrawal on the eve of trial. The petitioner indicated to the court that he had not asked counsel to withdraw and had waived any conflict, and that he wanted to proceed with the trial. He also informed the court that he was prepared to represent himself. The trial court did not agree to allow the petitioner to proceed to trial as a self-represented party at that time. Instead, the court declared a mistrial and continued the

[2] We note that although some of the substantive criminal statutes referred to in our recitation of the facts have been amended by the legislature since the events underlying the present appeal, such amendments lack any bearing on the merits of this appeal. Accordingly, for simplicity, we refer to the current revision of those statutes.

[3] Simon claimed he likely would be needed as a witness to rebut certain consciousness of guilt evidence that the state intended to present at trial.

matter so that new counsel could be appointed for the petitioner. At that hearing, the prosecutor also indicated to the court that the petitioner would soon be arrested on additional charges.

Shortly thereafter, the petitioner was arrested under a separate docket on charges of two counts of conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, and two counts of conspiracy to commit witness tampering in violation of General Statutes §§ 53a-48 and 53a-151. The court ordered that the cases be heard together, and the two cases were continued to February 26, 1999.

At the February 26, 1999 hearing, the petitioner was appointed a new criminal defense attorney, Thomas M. Conroy, to handle both of his files. Conroy was granted a further continuance.

In May, 1999, the petitioner, pursuant to a plea agreement that resolved all of the 1997 and 1999 charges, pleaded guilty under the *Alford* doctrine[4] to one count of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a, and one count of conspiracy to tamper with a witness in violation of §§ 53a-151 and 53a-48. The court canvassed the petitioner and found that there was a factual basis for the plea and that it was knowingly and voluntarily made. The trial court later sentenced the petitioner, consistent with the plea agreement, to a term of thirty years of incarceration on the manslaughter charge and to an unconditional discharge on the conspiracy charge. The state entered a nolle prosequi as to all of the other charges against the petitioner.

The petitioner filed his first action seeking a writ of habeas corpus in June, 2000. The petitioner was

[4] See *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

appointed habeas counsel, Attorney Sebastian DeSantis, who later filed an amended habeas petition. The amended petition alleged three claims of ineffective assistance directed at Simon and Conroy. Specifically, the "petitioner alleged that trial counsel failed (1) to pursue discovery and to communicate with him concerning it, (2) to challenge the petitioner's arrest and the search of the area in which he was arrested, as well as the arrest warrant itself, and (3) to communicate with him regarding legal standards and evidentiary standards so that the petitioner could make a knowing and voluntary decision as to whether to proceed to trial or plead guilty." Id., 247. The habeas court issued a decision on February 20, 2003, denying the amended habeas petition. Id. DeSantis failed to file a timely petition for certification to appeal from that decision. Id.

On February 26, 2003, the petitioner filed a pro se petition for certification to appeal, which the habeas court denied. Id. The petitioner, however, did not file an appeal from that denial within twenty days.

In June, 2003, the petitioner filed a letter with the habeas court, which the court treated as a motion for reconsideration of the habeas petition. Id., 247–48. Soon thereafter, the petitioner also filed a pro se motion for rehearing of his habeas petition. Id., 248. The court denied both of the petitioner's postjudgment motions without a hearing. Id. The petitioner filed a motion with this court on September 29, 2003, in which he sought permission to file a late appeal. Id. This court denied the motion on November 6, 2003. Id.

Nearly three years later, on July 18, 2006, the petitioner filed a new petition for a writ of habeas corpus alleging again the ineffective assistance of Simon and Conroy, but adding an allegation regarding the ineffective assistance of his first habeas counsel, DeSantis. Id. The petitioner was represented in this second habeas

action by Attorney Paul Kraus. The court resolved this second petition by agreeing to render a stipulated judgment that restored the petitioner's appellate rights with respect to the issues raised in the first habeas petition.[5] Id. Thereafter, the petitioner filed a new petition for certification to appeal from the judgment rendered in the first habeas action. Id. The court granted this second petition for certification to appeal, and the petitioner filed an appeal on September 8, 2006. Id.

The only issue raised in that first appeal, however, was whether the habeas court properly had denied without a hearing the petitioner's postjudgment motions for reconsideration and reargument. Id., 249. The petitioner did not raise the merits of the claims in the habeas petition against Simon and Conroy. Following oral argument, this court ordered the parties to submit supplemental briefs addressing whether the issues the petitioner had raised on appeal fell outside the scope of the stipulated judgment restoring the petitioner's appellate rights, which was limited to issues raised in the first habeas petition. Id., 248–49. Ultimately, this court declined to review the claims raised by the petitioner because they fell outside the scope of the stipulated judgment to which the petitioner had agreed. Id., 249. We affirmed the judgment of the habeas court denying the first petition; id., 250; and our Supreme Court denied a petition for certification to appeal from our decision. *Lebron* v. *Commissioner of Correction*, 289 Conn. 921, 958 A.2d 151 (2008).

The petitioner commenced the present habeas action, his third, in August, 2013. The operative amended petition for a writ of habeas corpus was filed by appointed

[5] Although neither party submitted to the habeas court in the present action any portion of the pleadings or decision in the second habeas action, we take judicial notice of the contents of that file. See *State* v. *Lenihan*, 151 Conn. 552, 554, 200 A.2d 476 (1964) (courts in this state have discretion to take judicial notice of court files in same or other cases).

counsel on January 8, 2016. The petition contains six counts. Counts one and two consist of freestanding constitutional claims directly challenging his underlying conviction. Specifically, count one claims that the criminal trial court, *Gaffney*, *J.*, violated the petitioner's right to counsel of choice by permitting Simon to withdraw prior to the start of trial despite the petitioner's willingness to waive any potential conflict of interest. See *State* v. *Peeler*, 265 Conn. 460, 470–76, 828 A.2d 1216 (2003), cert. denied, 541 U.S. 1029, 124 S. Ct. 2094, 158 L. Ed. 2d 710 (2004). Count two claims that Judge Gaffney violated the petitioner's right to self-representation by refusing what the petitioner claims was a clear and unequivocal request to represent himself at trial. See *State* v. *Flanagan*, 293 Conn. 406, 421–25, 978 A.2d 64 (2009). The remaining counts allege the ineffective assistance of trial and habeas counsel. In particular, count three alleges ineffective assistance by Simon relative to his having withdrawn as trial counsel.[6] Count four alleges ineffective assistance by Conroy, raising many of the same allegations of deficient performance that were raised in the first habeas petition but effectively abandoned in the previous appeal. Count five claims ineffective assistance by the petitioner's first habeas counsel, DeSantis, for failing to "discover, investigate and raise" the claims set forth in counts one, two and three, and failing to "adequately plead, prove and argue" the claims raised in count four. Count six claims ineffective assistance by the petitioner's second habeas counsel, Kraus, for failing to "discover, investigate and

[6] The petitioner alleged that Simon provided ineffective assistance by failing (1) to have a special public defender appointed to advise the petitioner of the risks involved in proceeding to trial with conflicted counsel; (2) to inform the court that the petitioner wanted to waive his right to conflict-free counsel; (3) to withdraw his motion to withdraw after the petitioner waived his right to conflict-free counsel; (4) to advise him of his right to seek review of the court's granting of the motion to withdraw; and (5) to advise him of his right to appeal from the denial of his request to represent himself.

raise" the claims set forth in counts one through four, and failing to "adequately plead, prove and argue" the claims raised in count five.

The respondent filed his return on February 29, 2016, in which he raised affirmative defenses as to counts one through four. With respect to counts one and two, the respondent alleged procedural default and waiver resulting from the petitioner's having entered a guilty plea. With respect to count three, the respondent raised the defenses of improper successive petition; see Practice Book § 23-29 (3); and waiver on the basis of the petitioner's guilty plea. The respondent also alleged the defense of improper successive petition with respect to count four. No defenses were pleaded with respect to counts five and six.

On March 7, 2016, the petitioner filed a reply to the return denying the allegations raised in the respondent's affirmative defenses. A certificate of closed pleadings was filed the same day.

The habeas court issued a notice and order on March 30, 2016, indicating that the court would consider whether there was good cause for trial on any of the counts raised in the petition, and inviting the parties to submit briefs and exhibits pursuant to § 52-470 (b) (2) by April 13, 2016. The court also issued the following order: "In light of the entry of guilty pleas by the petitioner, submitted exhibits must address whether the petitioner's guilty pleas operate as a waiver of the petitioner's right to pursue the claims in counts one through four of the amended petition. . . . Should there be no cause for trial as to counts one through four, then counts five and six, which are derivative of and depend on the first four counts, also cannot have good cause for trial." (Citations omitted.) Both parties filed submissions.

On April 26, 2016, the habeas court issued a memorandum of decision, concluding on the basis of the petition and the parties' submissions, that there was no good cause for trial as to any count of the petition. The court scheduled a hearing for May 4, 2016, to hear arguments in accordance with § 52-470 (b) (3). Following argument, on May 5, 2016, the habeas court rendered a judgment of dismissal of the entire petition, stating: "After consideration of the arguments and materials submitted at a hearing conducted by the court pursuant to General Statutes § 52-470 (b) (3), the court finds there is no good cause for a habeas trial in this case. Based on the reasoning the court elucidated in a memorandum of decision, dated April 26, 2016, the habeas corpus claims of the amended petition are dismissed, and that memorandum becomes the decision of this court in full."

On May 13, 2016, the petitioner filed a petition for certification to appeal, which the habeas court granted on May 18, 2016.[7] This appeal followed.

[7] In granting the petition, the habeas court noted: "The court questions whether a petition for [certification] is necessary in order for the petitioner to appeal from a *dismissal* under [§] 52-470 (b)." (Emphasis in original.) That issue is not before us in the present case. Nevertheless, we note that the statutory requirement that petitioners seek certification prior to the filing of an appeal with this court is found in subsection (g) of § 52-470, which provides that certification is required for appeals "from the judgment rendered in a habeas corpus proceeding . . . ." A dismissal or summary disposition of a petition for a writ of habeas corpus, whether made pursuant to § 52-470 (b), Practice Book § 23-29, or Practice Book § 23-37, is a "judgment rendered in a habeas corpus proceeding" and, as such, presumably would necessitate that an aggrieved petitioner file a petition for certification to appeal in accordance with § 52-470 (g) prior to initiating any appeal from such a judgment. See, e.g., *Parker* v. *Commissioner of Correction*, 169 Conn. App. 300, 308, 149 A.3d 174 (certification sought prior to appeal of § 52-470 [b] dismissal), cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016); *Day* v. *Commissioner of Correction*, 151 Conn. App. 754, 757, 96 A.3d 600 (dismissal pursuant to Practice Book § 23-29), cert. denied, 314 Conn. 936, 102 A.3d 1113 (2014); *Lawrence* v. *Commissioner of Correction*, 125 Conn. App. 759, 762, 9 A.3d 772 (2010) (summary judgment pursuant to Practice Book § 23-37), cert. denied, 300 Conn. 936, 17 A.3d 474 (2011).

The petitioner claims on appeal that the habeas court improperly dismissed the entirety of his petition pursuant to § 52-470 (b). According to the petitioner, in dismissing his petition for lack of good cause to proceed to trial, the court improperly relied in part on an affirmative defense that was not pleaded by the respondent in his return and concluded that the petitioner had waived certain counts by entering a guilty plea in the underlying criminal proceedings. The respondent argues that the habeas court properly determined that (1) the petitioner's guilty plea operated as a waiver of counts one, two, and three; (2) count four was barred as a successive claim pursuant to Practice Book § 23-29; and (3) counts five and six, which alleged ineffective assistance by the petitioner's prior habeas counsel in failing to "discover, investigate and raise" the claims set forth in counts one through four, were derivative of those counts and subject to dismissal on the same grounds. We agree with the respondent regarding the habeas court's ruling on the first four counts, but disagree that the habeas court properly found a lack of good cause with respect to the entirety of counts five and six.[8]

We begin our discussion by setting forth certain governing principles of law as well as our standard of review. Subsection (b) of § 52-470, which was revised in 2012 as part of comprehensive habeas reform, authorizes the habeas court to render a summary dismissal without a trial of all or part of a habeas petition if the court determines, either on motion by a party or sua sponte, that there is no "good cause" for trial. General Statutes § 52-470 (b) (1). In amending § 52-470, the legislature "intended to supplement that statute's efficacy in averting frivolous habeas petitions and appeals." *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 567, 153 A.3d 1233 (2017). The procedures that the court

[8] For clarity and ease of analysis, we address the petitioner's claims in a different order than they are set forth in the petitioner's brief.

and the parties must follow before a dismissal for lack of good cause may be rendered are set forth in the remaining subdivisions of the statute.

Subdivision (2) of subsection (b) provides: "With respect to the determination of such good cause, each party may submit exhibits including, but not limited to, documentary evidence, affidavits and unsworn statements. Upon the motion of any party and a finding by the court that such party would be prejudiced by the disclosure of the exhibits at that stage of the proceedings, the court may consider some or all of the exhibits in camera." General Statutes § 52-470 (b) (2).

Subdivision (3) of subsection (b) provides: "In order to establish such good cause, the petition and exhibits must (A) allege the existence of specific facts which, if proven, would entitle the petitioner to relief under applicable law, and (B) provide a factual basis upon which the court can conclude that evidence in support of the alleged facts exists and will be presented at trial, provided the court makes no finding that such evidence is contradicted by judicially noticeable facts. If the petition and exhibits do not establish such good cause, the court shall hold a preliminary hearing to determine whether such good cause exists. If, after considering any evidence or argument by the parties at such preliminary hearing, the court finds there is not good cause for trial, the court shall dismiss all or part of the petition, as applicable." General Statutes § 52-470 (b) (3).

In effect, the statute places the burden on a habeas petitioner who wants to avoid dismissal pursuant to § 52-470 (b) to (1) state some legally cognizable claim in the petition for a writ of habeas corpus itself, including the allegation of specific facts that, if proven, would entitle the petitioner to relief on such claim; and (2) to submit documentary exhibits sufficient to demonstrate that some evidence in support of those alleged specific

facts actually exists and will be presented at trial. As Judge Sferrazza indicated at the show cause hearing in the present case, a habeas court may dismiss the petition in whole or in part if it determines on the basis of the parties' submissions that "there is no good cause either in law or there's no factual basis for any claim."

In *Parker* v. *Commissioner of Correction*, 169 Conn. App. 300, 149 A.3d 174, cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016), we set forth the following general standard for reviewing a habeas court's dismissal of a portion of a petition pursuant to § 52-470 (b): "The conclusions reached by the [habeas] court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id., 312–13. We turn now to the claims raised on appeal.

I

We first address the petitioner's claim that the court improperly dismissed counts one, two and three of the operative petition on the ground that his guilty plea in the underlying criminal action acted as a waiver of the claims contained in those counts. According to the petitioner, there was a sufficient factual nexus between

the claims in those counts and his guilty plea to overcome such a waiver. We are not persuaded.

"It is well established that an unconditional plea of guilty, made intelligently and voluntarily, operates as a waiver of all nonjurisdictional defects and bars the later assertion of constitutional challenges to pretrial proceedings. *Tollett* v. *Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973). In general, the only allowable challenges after a plea are those relating either to the voluntary and intelligent nature of the plea or the exercise of the trial court's jurisdiction." *State* v. *Johnson*, 253 Conn. 1, 80, 751 A.2d 298 (2000); see also *State* v. *Niblack*, 220 Conn. 270, 276–77, 596 A.2d 407 (1991). Furthermore, a trial court has no duty to canvass a defendant to determine whether he or she understands every possible indirect or collateral consequence of a guilty plea. *State* v. *Gilnite*, 202 Conn. 369, 383, 521 A.2d 547 (1987).

Here, counts one and two of the habeas petition raise freestanding constitutional claims regarding the criminal trial court's decisions to grant Simon's motion to withdraw as counsel and to prohibit the petitioner from representing himself at trial. Both of those actions occurred prior to the petitioner's decision to enter a guilty plea in accordance with a plea agreement with the state at the time he was represented by Conroy. The petitioner never sought to withdraw his plea, and the claims themselves do not directly challenge the voluntariness of his plea. Further, the petitioner's claims do not challenge any aspect of the criminal court's subject matter jurisdiction. Accordingly, the constitutional challenges raised in counts one and two were waived when the petitioner entered his guilty plea. The petitioner has not directed our attention to any evidence submitted to the habeas court that, if presented at trial, would overcome the respondent's affirmative defense of waiver. Because the petitioner could

not prevail on his claims at a habeas trial as a result of that waiver, the court properly dismissed counts one and two of the petition for lack of good cause to proceed to trial.

With respect to count three of the petition, the claims in that count focus on the alleged ineffective assistance provided by Simon. See footnote 6 of this opinion. Generally, the petitioner alleges that Simon provided ineffective assistance by failing fully to advise the petitioner of various legal rights related to both Simon's motion to withdraw from representation and the petitioner's rights to proceed as a self-represented party. Like the petitioner's related freestanding constitutional claims, however, the claims of ineffective representation by Simon all relate to matters that occurred prior to the petitioner's independent decision to enter a guilty plea, at which time he was represented by Conroy. The petitioner has failed to establish a sufficient interrelationship between his claims directed at Simon's representation and his decision to plead guilty. Rather, the petitioner baldly asserts that he would have proceeded to trial and not pleaded guilty if Simon had been allowed to continue as counsel. That assertion, however, is really nothing more than pure speculation. The guilty plea that he eventually entered resolved not only the charges he faced at the time of Simon's withdrawal, but also the additional 1999 charges that he was arrested on soon thereafter. There is no evidence in this record to support the notion that Simon would have continued to counsel the petitioner to proceed with the trial in the face of the additional 1999 charges or to suggest that the state would have offered, and the petitioner accepted, the same plea agreement whether he had been represented by Simon or was self-represented. Accordingly, we conclude that the court properly determined that the claims raised in count three, like those in counts one and two, were waived by the

petitioner's guilty plea as a matter of law and properly dismissed for lack of "good cause."

II

We next consider the petitioner's claim that the habeas court improperly dismissed count four of the petition on the basis of the same waiver theory it employed to dismiss counts one through three, which theory, according to the petitioner, was not asserted by the respondent in his return as a special defense to count four. More particularly, the petitioner argues that even if the claims in counts one, two, and three were waived by the entry of his guilty plea, he "should be permitted to litigate the claim of whether [Conroy] was ineffective for failing to properly advise [him] about the strength of an appeal and the waiver that would occur by pleading guilty, as described in [count] four of [his] amended petition for a writ of habeas corpus." The respondent counters that the petitioner has misconstrued the basis for the habeas court's decision regarding count four. The respondent asserts that the habeas court dismissed count four not because it was waived by his guilty plea, but because it "was barred by the principles of res judicata, embodied in Practice Book § 23-29 [(3)], which bars successive petitions." The respondent claims that this defense was expressly pleaded in his return. We agree with the respondent.

The following facts are relevant to our discussion. The amended habeas petition filed in the petitioner's first habeas action was submitted as an exhibit by the petitioner in the present case. In that petition, the petitioner asserted, albeit in a single count, that he had received ineffective assistance from both Simon and Conroy. The specifications of deficient performance were directed at "the petitioner's attorneys," and allege that they had failed (1) "to pursue discovery to obtain and/or communicate with the petitioner regarding the

evidence against [him] such as police reports, witness statements and warrants," (2) "to challenge [his] arrest and the search of the area in which he was arrested and [his] arrest warrant," (3) "to communicate with [him] regarding legal standards and evidentiary standards so [he] could make a knowing and voluntary decision of whether to proceed to trial or to plead guilty," and (4) "to ensure the petitioner's plea was knowing, intelligent, and voluntary." Because Simon did not represent the petitioner at the time of the plea offer and the decision to plead guilty, it is clear that the third and fourth specifications of deficient performance related to Conroy.

The fourth count of the petitioner's amended petition in the present action again alleges that Conroy failed, in a variety of ways, to provide the effective assistance of counsel, which is protected under our state and federal constitutions. Specifically, the current petition alleges that Conroy's performance was deficient because he failed adequately to investigate aspects of the case and a potential claim of self-defense, to advise the petitioner about the strength of the state's case, to advise him regarding the consequences of his guilty plea, including the potential for waiver, and to advise the petitioner of his right to seek review of the court's rulings granting Simon's motion to withdraw and denying his request to represent himself. The petitioner acknowledges that he previously raised the same claim in his first habeas action, but alleges that he "did not have a full and fair opportunity to present this claim" in that action.

In addition to generally denying the factual allegations underlying count four, the respondent asserted by way of affirmative defense that the claims raised were improperly successive in nature and, therefore, subject to dismissal pursuant to Practice Book § 23-29 (3). The respondent further asserted that the allegations

made in count four present the same ground raised in a prior petition that was previously denied, the petitioner has failed to state any new facts or proffer new evidence not reasonably available at the time he filed the prior petition, and the petitioner received a full and fair opportunity to litigate his claim in the prior habeas action.

"Our courts have repeatedly applied the doctrine of res judicata to claims duplicated in successive habeas petitions filed by the same petitioner. . . . In fact, the ability to dismiss a petition [if] it presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition is memorialized in Practice Book § 23-29 (3)." (Citations omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 64–65, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011). Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ."

In analyzing whether a petition is based on the "same ground" and, thus, subject to dismissal pursuant to Practice Book § 23-29 (3), our Supreme Court has explained that a "ground is a sufficient legal basis for granting the relief sought. . . . Identical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language. . . . They raise, however, the same generic legal basis for the same relief. Put differently, two grounds are not identical if they seek different relief." (Citations omitted; internal quotation marks omitted.)

James L. v. *Commissioner of Correction*, 245 Conn. 132, 141, 712 A.2d 947 (1998). A claim of ineffective assistance of counsel during trial proceedings constitutes the "same ground" for purposes of § 23-29 (3), despite changes in the precise underlying specifications of deficient performance, unless such new specifications are based on facts or evidence not reasonably available when the ground was raised in the earlier petition.

In its memorandum of decision in the present case, the court clearly disposed of count four on the basis that the ground raised therein—the ineffective assistance of Conroy—is successive in nature because the same ground was raised in the petitioner's first habeas action. Because the petitioner would be unable to demonstrate that he would be entitled to habeas corpus relief, the court concluded that no good cause existed for a trial on that count. In disposing of count four on this basis, the court never mentioned that its decision was premised on waiver resulting from the petitioner's having pleaded guilty, nor would that have been a proper basis for dismissing count four because it challenged whether counsel provided constitutionally adequate advice regarding the decision to plead guilty. Furthermore, the court rejected the petitioner's assertion that he did not have a full and fair opportunity to present his claim in the first habeas matter because it lacked any degree of specificity on which to evaluate it.

The petitioner advanced no arguments in his principal brief on appeal to this court as to why we should overturn the habeas court's determination that count four amounted to an improper successive petition. Because the court's ruling is legally and logically correct and supported by the record, we reject the petitioner's claim of error with respect to count four and conclude that the habeas court properly dismissed that count for failure to establish good cause to proceed to trial.

III

Finally, we turn to the petitioner's claims that the court improperly dismissed counts five and six of the petition, which, respectively, alleged the ineffective assistance of former habeas counsel DeSantis and Kraus. For the reasons that follow, and on the basis of the record before the habeas court, we conclude that the court improperly determined, at least in part, that there was no good cause to allow those counts to proceed to trial.

Our Supreme Court, in *Lozada* v. *Warden*, 223 Conn. 834, 843, 613 A.2d 818 (1992), established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing "what is commonly known as a 'habeas on a habeas,' namely, a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal." *Kaddah* v. *Commissioner of Correction*, supra, 324 Conn. 550; see id., 563–70 (extending *Lozada*'s holding to encompass third habeas petition challenging performance of second habeas counsel). Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the "herculean task"; *Lozada* v. *Warden*, supra, 843; of proving in accordance with *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), both "(1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective." *Lozada* v. *Warden*, supra, 842. Any new habeas trial "would go to the heart of the underlying conviction to no lesser extent than if it were a challenge predicated on ineffective assistance of trial or appellate counsel. The second habeas petition is inextricably interwoven with the merits of the original judgment by challenging the very

fabric of the conviction that led to the confinement." Id., 843.

Simply put, a petitioner cannot succeed as a matter of law—and, thus, cannot show good cause to proceed to trial—on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised. We agree with the habeas court that this principle is fatal to those portions of counts five and six of the petition that allege that former habeas counsel provided ineffective assistance by failing to raise or pursue the claims he alleges in counts one through three of the current petition. As we concluded in part I of this opinion, the habeas court properly dismissed counts one through three, correctly determining that the freestanding constitutional claims and the claims of ineffective assistance by Simon were waived as a matter of law by the petitioner's guilty plea. Thus, even if either habeas counsel performed deficiently in raising and prosecuting those underlying claims, any claim of ineffective assistance necessarily would fail because the petitioner would be unable to demonstrate that he was entitled to relief on the underlying claims. The court, therefore properly dismissed those portions of counts five and six that were premised on habeas counsels' alleged ineffective assistance with respect to claims asserted in counts one through three of the current habeas petition.

That same analysis, however, does not apply equally to the ineffective assistance of counsel claim directed at Conroy in count four, which relates in part to the voluntariness of the petitioner's guilty plea. As discussed in part II of this opinion, those allegations were not waived because the petitioner pleaded guilty, but

rather were barred by the habeas court as an improper successive claim under Practice Book § 23-29 (3) because the ground of ineffective assistance by Conroy had been raised and litigated in the petitioner's first habeas petition. Nevertheless, as recognized by the habeas court, the issue of whether DeSantis was ineffective in his handling of the claims against Conroy was never fully litigated but resolved by a stipulated judgment that restored the petitioner's appellate rights with respect to claims raised in the first habeas action. Similarly, whether Kraus, in the second habeas action, provided ineffective assistance with respect to the allegations in count five against DeSantis also has never been raised or litigated fully in a previous action. Unlike the situation as to counts one through three therefore, we cannot conclude that all claims directed against Conroy as set forth in count four necessarily fail as a matter of law and, therefore, we are left to consider whether the petitioner demonstrated good cause to proceed to trial on count five, limited to the claims that prior habeas counsel failed to properly raise or adequately litigate the alleged ineffective assistance of Conroy with respect to the voluntariness of the petitioner's guilty plea, and, with respect to count six against Kraus, whether Kraus failed to raise the ineffective assistance of DeSantis.[9]

In reaching its conclusion that the petitioner had not satisfied his burden of proof by both alleging facts that, if proven, would entitle him to relief and producing evidence demonstrating that those alleged facts exist, the habeas court focused primarily on the petitioner's affidavit, which he had attached as an exhibit to his memorandum of law in support of a finding of good cause. The court stated with respect to the claims

[9] We construe the habeas court's decision as properly having followed a similar analytical path to the one that we have employed.

against Conroy: "The affidavit also attests to the petitioner's interactions with [Conroy] after he replaced [Simon]. The petitioner's focus as to [Conroy] is his not investigating, challenging or appealing the issues the petitioner has identified relating [Simon's] withdrawal. Had both [Simon] and [Conroy] done all that the petitioner alleges they did not do, then he would not have pleaded guilty."

After next setting forth its conclusion that the petitioner failed to meet his burden of proof under § 52-470 (b), the court expounded on that conclusion as follows: "Most importantly, the petitioner's attestations in his affidavit do not establish the necessary interrelationship between ineffective assistance of counsel and the plea itself. . . . Stated somewhat differently, none of the petitioner's claims have a direct relationship to the validity of the plea itself, and any relationship he asserts is too indirect and tenuous." We conclude that, although this conclusion is apt with respect to the claims pertaining to Simon's performance; see part I of this opinion; it is improper with respect to certain allegations against Conroy, and that error undermines the court's determination that no good cause to proceed to trial existed regarding those particular allegations.

Among the documentary evidence that may be submitted in support a finding of good cause to proceed to trial are affidavits and unsworn statements. General Statutes § 52-470 (b) (2). The assertions in the petitioner's affidavit regarding Conroy's performance included his averment that he would not have pleaded guilty if Conroy had properly advised him that a guilty plea would operate as a waiver of his right to challenge the court's decisions not to allow him to proceed to trial with Simon as his counsel of choice or to represent himself. Specifically, the petitioner averred that "[i]f [Conroy] had told me that pleading guilty would cause me to waive my right to appeal from Judge Gaffney's

denial of my request to have [Simon] continue as my attorney I would not have pleaded guilty." From that statement, a reasonable factual inference may be drawn that Conroy never advised the petitioner about that particular legal consequence of his plea. If such testimony was credited at trial, the petitioner's statement and reasonable inference would constitute evidence supporting his assertion in the petition that he received ineffective assistance from Conroy and that Conroy's deficient performance directly related to the knowing and voluntary nature of his plea. This stands in direct conflict with the habeas court's reasoning. There is further evidence in the record that DeSantis failed to appeal from the denial of the first petition, which led to the need for a second action to restore the petitioner's appellate rights. Although it is possible on the basis of the entire record in this case, including the second habeas action, to theorize other potentially viable affirmative defenses that the respondent might have successfully pleaded with respect to counts five and six, the respondent failed to raise any defenses to those counts in its return. Because we cannot countenance the dismissal of a habeas petition on the basis of a defense not pleaded in the return; see *Day* v. *Commissioner of Correction*, 151 Conn. App. 754, 759–60, 96 A.3d 600, cert. denied, 314 Conn. 936, 102 A.3d 1113 (2014); it is unwise to engage in any further discussion of such possibilities. The habeas court's rationale for dismissing counts five and six in their entirety simply lacks support in the record before us, and our review of the pleadings and evidentiary submissions leads us to conclude that at least a portion of the petition has a sufficient basis in both fact and law to proceed to a trial.

To summarize, we reverse the judgment of dismissal pursuant to § 52-470 (b) only with respect to those portions of count five alleging that the petitioner's first

habeas counsel failed adequately to plead, prove, and argue those claims raised in count four of the amended petition regarding Conroy's alleged failure to advise the petitioner of the consequences of his guilty plea. We further reverse the judgment with respect to that portion of count six, which claims that the petitioner's second habeas counsel failed to adequately plead, prove, and argue the surviving portions of count five. The matter is remanded for further proceedings on those portions of the petition only. We otherwise affirm the habeas court's decision to dismiss the amended petition.

The judgment is reversed in part and the case is remanded for further proceedings in accordance with the preceding paragraph; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PAUL DAVIS (AC 37582)

Alvord, Mullins and Beach, Js.*

Syllabus

Convicted of accessory to murder, conspiracy to commit murder and attempt to commit murder, the defendant appealed. The defendant's conviction stemmed from his participation in a drive-by shooting in which two passengers in a car he was driving shot at a group of children on a street corner, killing F and seriously wounding another. This court affirmed the judgment and, thereafter, the defendant filed a petition for certification with our Supreme Court, which granted the petition and remanded the matter to this court to consider the defendant's unpreserved claim that the trial court committed plain error by erroneously instructing the jury that the state did not need to prove that the defendant had the specific intent to kill F in order to find him guilty of accessory to murder. On remand, *held* that the defendant's claim failed under a plain error analysis because it was clear that the court correctly instructed the jury

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

that it did not have to find a specific intent to kill a particular victim in order to find the defendant guilty of accessory to murder; that court properly instructed the jury that to find the defendant guilty, it had to find that he had the specific intent to kill, but that it did not have to find that he intended to kill F specifically, as the murder statute (§ 53a-54a) on its face allows for transferred intent for the crime of murder such that, when a person engages in conduct with the intent to kill someone, there can be a separate count for every person actually killed, and under the circumstances here, the court's instructions were correct in law and were tailored to the evidence presented, which showed that the defendant and his cohorts had no particular victim in mind when they set out to engage in a retaliatory killing and fired more than seventeen bullets at the group of children on the street corner.

Argued September 26—officially released November 28, 2017

Procedural History

Substitute information charging the defendant with the crimes of accessory to capital felony, accessory to murder, conspiracy to commit murder and attempt to commit murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Dewey*, *J.*; verdict and judgment of guilty of accessory to murder, conspiracy to commit murder and attempt to commit murder, from which the defendant appealed; thereafter, this court affirmed the judgment; subsequently, the defendant filed a petition for certification to appeal with our Supreme Court, which granted the petition and remanded the matter to this court to consider the defendant's claim. *Affirmed.*

Mary A. Beattie, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *John F. Fahey*, senior assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. This case returns to us on remand from our Supreme Court; see *State* v. *Davis*, 325 Conn. 918,

163 A.3d 618 (2017); with direction to consider the claim of plain error raised by the defendant, Paul Davis, in light of its decision in *State* v. *McClain*, 324 Conn. 802, 155 A.3d 782 (2017). We now consider the defendant's appeal from the judgment of conviction of accessory to murder in violation of General Statutes §§ 53a-54a (a) and 53a-8 (a),[1] in which he claimed that the trial court committed plain error by improperly instructing the jury that it was not necessary for the state to prove that the defendant intended to kill the victim to find him guilty of accessory to murder.

We conclude that the trial court did not instruct the jury that it was not necessary for the state to prove the defendant's intent to kill. Rather, the trial court properly instructed the jury that the state was not required to prove that the defendant intended to kill the specific victim that was killed. Accordingly, we affirm the judgment of the trial court.

The following facts, as set forth in our first *Davis* opinion; *State* v. *Davis*, 163 Conn. App. 458, 136 A.3d 257 (2016), remanded in part, 325 Conn. 918, 163 A.3d 618 (2017); are relevant here. "The defendant was a member of a gang in Hartford. On May 28, 2006, in retaliation for a shooting that occurred earlier that day in which another member of the defendant's gang was shot, the defendant, Ackeem Riley and Dominique Mack discussed conducting a drive-by shooting in the Nelton

[1] The defendant also was convicted of conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a), and attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a (a). We upheld those convictions in *State* v. *Davis*, 163 Conn. App. 458, 136 A.3d 257 (2016), remanded in part, 325 Conn. 918, 163 A.3d 618 (2017). Additionally, the defendant had been charged with, but acquitted of, accessory to capital felony in violation of General Statutes (Rev. to 2005) § 53a-54b (8) and § 53a-8 (a). Pursuant to our Supreme Court's remand order, we consider under the plain error doctrine only the defendant's conviction of accessory to commit murder.

Court area of Hartford. The trio had no specific victim intended.

"The defendant drove himself, Riley and Mack toward the Nelton Court area in a car he had borrowed. Riley was armed with a nine millimeter Glock handgun. Mack was armed with a nine millimeter Taurus. As the defendant drove, he, Riley and Mack saw a group of children at the corner of Elmer and Clark Streets. Riley and Mack fired at least seventeen shots from their handguns at the group, striking two boys. One of the victims, Kerry Foster, Jr., a fifteen year old boy, was hit by five bullets, resulting in his death. The other victim, Cinque Sutherland, a fourteen year old boy, was hit by three bullets, resulting in serious injury.

"After the shooting, the defendant, Riley and Mack fled the scene and left the car on Guilford Street. From there, they summoned a cab to take them to 140 Oakland Terrace. Riley, Mack and another man later returned to the vehicle and set it on fire.

"On June 7, 2006, the defendant agreed to speak with members of the Hartford Police Department, and he provided them with information about the shooting. He told the officers about the planning of the shooting, the types of firearms used and where they could be found. He also told them how the vehicle used in the shooting later was set on fire. The defendant, however, did not disclose his involvement in the shooting until almost three years later, in May, 2009, when he again spoke to the police and provided a written statement.

"After providing a written statement to the police, the defendant was charged [inter alia] with and later convicted of accessory to murder . . . ." Id., 460–61; see also footnote 1 of this opinion. Additional facts will be set forth as necessary.

The defendant claims, with respect to his conviction of accessory to murder, that the trial court improperly

instructed the jury that it was not necessary for the state to prove that he intended to kill the victim to find him guilty of accessory to murder. The defendant concedes that he waived this claim pursuant to *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011). He argues, however, this instruction was "plain error and failure to grant relief would result in manifest injustice." We are not persuaded that the court committed error in its instruction.

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [Previously], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812.

In evaluating a claim of instructional impropriety, however, "we must view the court's jury instructions as a whole, without focusing unduly on one isolated aspect of the charge. . . . In determining whether a jury instruction is improper, the charge . . . is not to be critically dissected for the purpose of discovering possible inaccuracies of statement, but it is to be considered rather as to its probable effect [on] the jury in guiding [it] to a correct verdict in the case." (Citation omitted; internal quotation marks omitted.) *State* v. *Carrion*, 313 Conn. 823, 845, 100 A.3d 361 (2014).

During its charge to the jury on the crime of accessory to murder, the court instructed, in relevant part: "I have provided the elements of the crime of murder previously. However, with respect to intent in this particular count, it is not necessary for a conviction of murder that the state prove that the defendant intended to kill Kerry Foster." The defendant contends that this is "a patently incorrect statement of the law" because it told the jury that the state "did not need to prove specific intent to murder." The state responds that the court's instruction was correct in law and that it did not tell the jury that it did not have to find a specific intent to kill—only that it did not have to find a specific intent to kill *this particular victim*. We agree with the state.

When instructing the jury in this case, the court repeatedly told it that in order to find the defendant guilty, it had to find that the defendant had the specific intent to kill. When the court gave its instructions on the crime of murder, *which it specifically referenced* in its instructions on accessory to murder, the court stated: "For you to find the defendant guilty of the charge of murder, the state must prove the following elements beyond a reasonable doubt:

"An intent to cause death. The first element is that the defendant specifically intended to cause the death

of another person. There is no particular length of time necessary for the defendant to have formed the specific intent to kill. A person acts intentionally with respect to a result when his conscious objective is to cause such result.

"The specific intent to cause death may be inferred from circumstantial evidence. Please refer to my earlier instructions concern[ing] specific intent. The type and number of wounds inflicted may be considered as evidence of the perpetrator's intent and from such evidence an inference may be drawn that there was intent to cause death. Any inference may be drawn from the nature of any instrumentality used and the manner of its use in an inference of fact to be drawn by you upon consideration of these and other circumstances in the case in accordance with my previous instructions. This inference is not a necessary one. That is, you are not required to infer intent from the defendant's alleged conduct, but it is an inference you may draw if you find it is reasonable and logical and in accordance with my instructions on circumstantial evidence.

"The second element is that the defendant, acting with the intent to cause the death of another person, caused the death of Kerry . . . Foster. This means that the defendant's conduct was the proximate cause of the decedent's death. You must find it proved beyond a reasonable doubt that Kerry Foster . . . died as a result of the actions of the defendant. Please refer to the earlier instructions concerning proximate cause.

"Now, summary of murder. In summary, to establish the offense of murder, the state must prove beyond a reasonable doubt: one, the defendant intended to cause the death of another person, and two, in accordance with that intent, the defendant cause[d] the death of Kerry Foster."

Then, on the particular charge of accessory to murder, the court instructed the jury in relevant part: "I have provided the elements of the crime of murder previously. However, with respect to intent in this particular count, it is not necessary for a conviction of murder that the state prove that the defendant intended to kill Kerry Foster." The court also instructed: "To establish the guilt of a defendant as an accessory . . . the state must prove criminality of the intent and community of the unlawful purpose. That is, for the defendant to be guilty as an accessory, it must be established that he acted with the mental state necessary to commit murder and that in furtherance of that crime, he solicited, requested, commanded, importuned, or intentionally aided the principal to commit murder. Evidence of mere presence as an inactive companion, or passive acquiescence, or the doing of innocent acts which, in fact, aid in the commission of a crime, is insufficient to find the defendant guilty as an accessory under the statute."

Pursuant to § 53a-8 (a): "A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

Pursuant to § 53a-54a (a): "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person *or of a third person* . . . ." (Emphasis added.) "Thus, the statute on its face allows transferred intent for the crime of murder . . . . The clear meaning of the statute leads to the result that, when a person engages in conduct with the intent to *kill someone*, there can be a separate count of murder *for every person actually killed by the conduct*."

(Emphasis altered.) *State* v. *Courchesne*, 296 Conn. 622, 713, 998 A.2d 1 (2010).

The facts of this case demonstrate that the defendant and his cohorts drove toward the Nelton Court area determined to kill in retaliation for the death of one of their friends earlier in the day. *State* v. *Davis*, supra, 163 Conn. App. 460–61. As they saw a group of children standing on a corner, they opened fire, firing more than seventeen bullets toward those children, with no specific victim intended; they just intended to kill someone. Id.

We conclude that the court's instructions, tailored to the facts of this case, were correct in law and fit with the evidence presented, namely, that the defendant and his cohorts had no particular victim in mind; they just wanted to engage in a retaliatory killing. The court correctly instructed the jury that it did not have to find that the defendant intended to kill any specific person, only that the defendant intended to kill someone. On the basis of our review of the court's instructions, we conclude that the defendant's claim fails a plain error analysis. There is no error.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAMARR FOWLER
(AC 38979)

DiPentima, C. J., and Alvord and Pellegrino, Js.

Syllabus

The defendant, who had been on probation in connection with his conviction of the crimes of interfering with an officer and forgery in the second degree, appealed to this court from the judgment of the trial court revoking his probation and committing him to the custody of the Commissioner of Correction for a period of three years. *Held*:

1. The trial court's finding that the defendant violated conditions of his probation by failing to keep probation officers informed of his whereabouts and to provide probation officers with a valid and verifiable address was not clearly erroneous and was supported by sufficient evidence in the record; the evidence in the record demonstrated that, for approximately seven weeks, probation officers attempted to obtain a verifiable address for the defendant but that he failed to provide a valid address despite numerous opportunities to do so.
2. This court having determined that there was sufficient evidence for the trial court to find that the defendant violated the conditions of his probation by failing to keep probation officers informed of his whereabouts and to provide a valid and verifiable address, which was sufficient to serve as a basis for revoking his probation, it was not necessary for this court to consider the defendant's claim that the office of probation did not have the authority to require him to submit to global positioning system monitoring, or whether the defendant's refusal to do so constituted a violation of the conditions of his probation.

The defendant's claim that the trial court erred in denying his oral motion to dismiss was not reviewable, the defendant having failed to brief the claim adequately.

Argued October 5—officially released November 28, 2017

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *A.*, *Grogins*, *J.*, denied the defendant's motion to dismiss; thereafter, the matter was tried to the court; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Robert J. McKay, assigned counsel, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo*, *Jr.*, state's attorney, and *Mitchell Rubin*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Jamarr Fowler, appeals from the judgment of the trial court revoking his probation and imposing a previously suspended three year

prison sentence. On appeal, the defendant claims that the trial court improperly (1) found a violation of probation on the basis of insufficient evidence; (2) determined that the Office of Probation had authority to include a probation condition that the defendant must submit to global positioning system (GPS) monitoring; and (3) denied the defendant's motion to dismiss. We affirm the judgment of the trial court.

The record reveals the following relevant facts.[1] On July 30, 2015, pursuant to a plea agreement, the defendant pleaded guilty to one count of interfering with an officer in violation of General Statutes § 53a-167a and one count of forgery in the second degree in violation of General Statutes § 53a-139. The trial court, *White J.*, imposed a total effective sentence of three years incarceration, fully suspended, followed by three years of probation. That same day, the defendant met with a probation intake specialist and reviewed the conditions of his probation, which required, in relevant part, that he "[k]eep the probation officer informed of where you are," "tell your probation officer immediately about any change to your . . . address," and "[d]o not leave the State of Connecticut without permission from the probation officer."[2]

At the time of his intake, the defendant informed Probation Officer Shonda Wright that he had no family or ties in the state of Connecticut, and that he was living in a New York homeless shelter prior to his arrest.

[1] Although the trial court did not make detailed factual findings as to each of the facts discussed herein, it did state on the record that "I also find I credited the testimony and the exhibits heard." The grounds for the trial court's conclusion that the defendant violated his probation are adequately shown in the record before this court.

[2] The defendant signed the conditions of probation to acknowledge that he read and understood them, that a probation officer had reviewed them with him, and that he would follow them.

Probation Officer Wright told the defendant that probation officials would investigate transferring his probation to the state of New York, but only if he provided a valid and verifiable New York address. Probation Officer Wright instructed the defendant to contact the probation office on August 3, 2015, with a verifiable New York address.

On August 3, the defendant called the probation office and spoke to Probation Officer Wright. He explained that he was in New York, homeless, and could not provide a New York address to facilitate the transfer of his probation. Probation Officer Wright informed the defendant that if he could not provide a New York address, his probation would have to be supervised in Connecticut.

On August 10, 2015, the defendant called Probation Officer Wright and informed her that he still did not have a New York address. He claimed that he was in New York at the time, but could not provide her with the address of where he was staying. Probation Officer Wright again informed the defendant that if he did not secure a New York address as soon as possible, he would have to return to Connecticut and be supervised by Connecticut probation officials.

Because probation officials considered the defendant to be a "higher risk" probationer due to his failure to provide a verifiable address and his newly discovered status as a registered sex offender in New York,[3] Chief Probation Officer Lorraine Rodrigues assumed oversight of the defendant's file on August 14, 2015. On that date, Chief Probation Officer Rodrigues spoke with the defendant and reminded him that he was required either to provide a New York address, or return to Connecticut

[3] An August 5, 2015 criminal background check revealed that the defendant was registered as a sex offender in New York, and that he was listed as homeless on New York's sex offender registry.

to be supervised, and that if he did not do so by August 17, 2015, probation officials would issue a violation of probation warrant for his arrest. She also advised the defendant that the decision to accept the transfer of his probation was "completely discretionary" on the part of New York probation officials, who would investigate whether any address that he provided was suitable for supervision. She also informed him that if New York probation officials rejected the transfer, he would have to return to Connecticut to be supervised.[4]

On August 17, 2015, the defendant contacted Probation Officer Wright and provided her with a New York address. Probation Officer Wright forwarded the address to New York probation officials as part of an application for an interstate transfer. On September 8, New York probation officials notified Connecticut probation officials that New York had denied the interstate transfer request because the provided address was within 1000 feet of a public school, which was not permitted due to the defendant's status as a registered sex offender. That same day, Probation Officer Wright informed the defendant that his interstate transfer request was denied. She directed the defendant to return to Connecticut by September 10, 2015, to be supervised by Connecticut probation officials. Probation Officer Wright described the defendant as "very agitated" during this phone call. Probation Officer Wright transferred the call to Chief Probation Officer Rodrigues, who reiterated the same information to the defendant.[5]

[4] During this phone call, Chief Probation Officer Rodrigues informed the defendant that if he could not find housing in Connecticut, probation officials would investigate placing him in transitional housing or a local shelter.

[5] Later that day, the defendant called Connecticut's central probation office stating that he did not understand why New York had denied his transfer request. He claimed that New York probation officials previously supervised him at the address he provided and that the address had been "preapproved." Probation officials contacted New York and learned that, in fact, the defendant had never been under probation or parole supervision in New York.

On September 10, 2015, the defendant called Chief Probation Officer Rodrigues. Chief Probation Officer Rodrigues advised the defendant that he was in New York without permission, and instructed him to return to Connecticut by 10 a.m. on September 15, 2015, or probation officials would issue a violation of probation warrant.[6] Later that day, the defendant called Chief Probation Officer Rodrigues and stated that he remembered that he had a pending criminal case in New York and his conditions of release did not permit him to leave the state. Connecticut probation officials investigated this claim, and discovered that while the defendant did have a pending criminal case in New York, the court-ordered conditions of his release did not prohibit him from leaving that state.[7]

On September 15, 2015, the defendant reported to the Stamford probation office with his attorney, Benjamin Aponte. The defendant and Aponte met with Chief Probation Officer Rodrigues and Chief Probation Officer Marvin Parsons. At that meeting, the defendant provided an address in the Bronx, New York. He claimed that his aunt had an apartment there, and that she would allow him to take over the lease and reside at the apartment. Chief Probation Officer Parsons asked the defendant for his aunt's contact information, and the defendant was unable to provide it. On the basis of the defendant's inability to provide contact information,

[6] Chief Probation Officer Rodrigues described the defendant as "argumentative" during this call. He asserted that he had just started a new job in New York, did not have the finances to return to Connecticut, did not have a place to stay in Connecticut, and did not want to return to Connecticut. Chief Probation Officer Rodrigues informed the defendant that if his employment was verified, probation officials would consider allowing him to travel back and forth to New York for work. Chief Probation Officer Rodrigues again informed the defendant that probation could refer him to transitional housing or a local shelter. The defendant rejected Chief Probation Officer Rodrigues' offer of temporary housing.

[7] Rather, the defendant and his bail bondsman on the New York matter agreed that he would not leave New York.

coupled with New York's previous rejection of the defendant's transfer request due to the defendant's then stated New York address, Chief Probation Officer Parsons declined at that time to investigate the Bronx address.[8] Chief Probation Officers Parsons and Rodrigues also informed the defendant that his conditions of release in New York did not bar him from leaving the state.[9] Chief Probation Officers Parsons and Rodrigues instructed the defendant to provide the name and address of the hotel[10] where he would be staying that night so that his location could be confirmed, and also instructed him to appear for a scheduled appointment the following day. The defendant did not provide an address that night as instructed.

On September 16, at 5 a.m., the defendant called the probation office and left a voicemail stating that he was staying at 20 Hale Drive in Windsor. At Chief Probation Officer Parsons' request, two probation officers from Hartford traveled to the Windsor address to investigate. The probation officers spoke with a female resident, who told them that she did not know the defendant and he was not residing at the address. Subsequently, the defendant called the probation office and claimed that a friend, unbeknownst to the friend's wife, was

[8] Chief Probation Officer Parsons did, however, advise the defendant that probation officials would investigate whether the Bronx address was suitable for transferring his case if he provided contact information for his aunt.

[9] Chief Probation Officers Parsons and Rodrigues offered to notify the bondsman that the defendant had legal obligations in Connecticut. They also informed the defendant that probation officials would permit him to travel back and forth to New York for any court appearances there, as long as the appearances could be verified.

[10] Chief Probation Officers Parsons and Rodrigues offered to secure the defendant housing at a local shelter in Stamford, but the defendant declined to stay at a local shelter and instead requested information about hotels in the Stamford area. Knowing, based on the defendant's representations, that he was homeless, Chief Probation Officer Rodrigues provided the defendant with a list of low budget hotels and motels. The defendant rejected that list as unsuitable and stated that he would find his own housing.

allowing him to stay in the back of the Windsor residence in a shed. The defendant refused to provide contact information for his friend. The defendant was instructed to bring the information to a scheduled appointment later that day.

Later that day, one and a half hours late, the defendant reported to the probation office. At that point, because the defendant still had failed to provide a valid and verifiable address, probation officials informed the defendant that he would be placed on a GPS monitor. The defendant refused, stating, "never in a million years would I agree to go on a GPS monitor." Because the defendant had been given approximately seven weeks to provide a valid and verifiable address and failed to do so, and was considered a higher risk due to his sex offender status in New York, Chief Probation Officer Parsons drafted an application for an arrest warrant for violation of probation when the defendant refused to submit to GPS monitoring. That same day, the court, *Hon. Richard F. Comerford, Jr.*, judge trial referee, signed the warrant and probation officials arrested the defendant.

During the adjudication phase of the defendant's violation of probation hearing, the state called Chief Probation Officer Parsons to testify and entered five exhibits into evidence, including a copy of the defendant's signed conditions of probation and the violation of probation warrant. The defendant did not offer any evidence. The trial court, *A.*, *Grogins*, *J.*, found that the defendant had violated the conditions of his probation, specifically that he failed to keep probation apprised of his whereabouts and failed to provide a valid and verifiable address to probation. Following the adjudication phase of the hearing, the court sentenced the defendant to a period of three years incarceration. This appeal followed.

I

The defendant's first claim on appeal is that there was insufficient evidence to support the trial court's finding that he violated a condition of his probation. Specifically, he contends that "according to the testimony of [Chief] Probation Officer Parsons . . . [he] did, in fact, keep the probation department informed of his whereabouts at all times."[11] We disagree.

"[A] probation revocation hearing has two distinct components. . . . The trial court must first conduct an adversarial evidentiary hearing to determine whether the defendant has in fact violated a condition of probation. . . . If the trial court determines that the evidence has established a violation of a condition of probation, then it proceeds to the second component of probation revocation, the determination of whether the defendant's probationary status should be revoked. . . . To support a finding of probation violation, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . This court may reverse the trial court's initial factual determination that a condition of probation has been violated only if we determine that such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence to support it, the reviewing

[11] The defendant also argues that he was "allowed by the probation department to leave the state of Connecticut to find an address in the state of New York" and "constantly reported in person or by phone to a probation officer as directed by probation." The trial court only found that the defendant had violated the condition that he keep probation informed of his whereabouts and provide probation with a valid and verifiable address. Accordingly, we need not address the defendant's arguments as to the conditions of his probation prohibiting him from leaving Connecticut without permission and requiring him to report to probation as directed.

court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling. . . . A fact is more probable than not when it is supported by a fair preponderance of the evidence." (Internal quotation marks omitted.) *State* v. *Sherrod*, 157 Conn. App. 376, 381–82, 115 A.3d 1167, cert. denied, 318 Conn. 904, 122 A.3d 633 (2015).

The record reveals sufficient evidence for the court reasonably to have found that the defendant violated the conditions of his probation by failing to keep probation officers informed of his whereabouts and failing to provide probation officers with a valid and verifiable address. At the violation of probation hearing, the state entered into evidence, inter alia, the defendant's conditions of probation and the violation of probation warrant, and also called Chief Probation Officer Parsons to testify as to the basis for the drafting of the violation of probation warrant. Chief Probation Officer Parsons detailed the approximately seven week efforts of probation officials to obtain a verifiable address for the defendant in either Connecticut or New York. He explained that probation officials violated the defendant because "he had been given approximately a month and a half to provide a valid address, either in the state of New York or Connecticut and was unable to do so. . . . [W]e just did not have an established residence for him and we felt that he was afforded ample opportunity to provide that." The court credited the state's evidence and found that "after listening to the testimony presented by the state and reviewing all of the exhibits in the record provided that the defendant did violate the conditions of his probation and the state proved that by a fair preponderance of the evidence and specifically proved that the defendant did not keep probation

apprised of his whereabouts and that he failed to provide a valid and verifiable address to probation." Based on the evidence presented of the defendant's repeated failures to provide a valid and verifiable address in either New York or Connecticut despite numerous opportunities to do so, we cannot conclude that the trial court's finding that the defendant violated the conditions of his probation was clearly erroneous. See *State* v. *Miller*, 83 Conn. App. 789, 795–96, 851 A.2d 367 (sufficient evidence for trial court to find a violation of probation where probation officer testified that [1] he called two phone numbers provided by defendant and spoke with individuals who led him to believe that defendant was not residing there; and [2] sent letters to two addresses provided by defendant and both were returned, one marked "[d]oesn't live here" [internal quotation marks omitted]), cert. denied, 271 Conn. 911, 859 A.2d 573 (2004); *State* v. *Garuti*, 60 Conn. App. 794, 797–98, 761 A.2d 774 (2000) (sufficient evidence for trial court to find violation of probation where probation officer testified that when he visited an address provided by defendant, a woman informed him that defendant "had never stayed at that address" [internal quotation marks omitted]), cert. denied, 255 Conn. 931, 767 A.2d 102 (2001).

"The weight to be given [to] the evidence and [to] the credibility of witnesses [is] solely within the determination of the trier of fact. . . . The court performed its duty, and we will not usurp its function." (Citation omitted; internal quotation marks omitted.) *State* v. *Shakir*, 130 Conn. App. 458, 469, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011). In light of this record, we conclude that there was sufficient evidence to find that the defendant violated his probation.[12]

[12] The defendant also challenges the trial court's revocation of his probation and imposition of the previously suspended three year prison sentence as an abuse of discretion. In making the determination of whether a defendant's probation should be revoked, "the trial court is vested with broad discretion." (Internal quotation marks omitted.) *State* v. *Sherrod*, supra, 157

II

The defendant next claims that the trial court improperly determined that the office of probation had authority, pursuant to General Statutes § 53a-30 (b),[13] to require him to submit to GPS monitoring during his probationary period. He argues that "[t]he probation department did not have authority to add this condition since it was not included as part of the defendant's plea agreement, which the court, *White*, *J.*, accepted," and that General Statutes § 53a-30 (c) "requires a hearing and a showing of good cause before any additions or enlargements can be made to his condition of probation." He further contends that "the refusal to wear a GPS monitor, when not a standard or special condition ordered by the court at his plea of July 30, 2015, does not constitute a violation of his probation." We need not address this claim.

"[A] violation of any one condition of probation would suffice to serve as a basis for revoking the defendant's probation. . . . Our law does not require the

Conn. App. 382. "On appeal, we will disturb a trial court's sentencing decision only if that discretion clearly has been abused." *State* v. *Shakir*, supra, 130 Conn. App. 470. In the sentencing phase of the hearing, the trial court concluded: "I find that based on the credible testimony presented that you had numerous opportunities and time provided to you to follow probation's direction and keep them apprised of your whereabouts and give them a valid and verifiable address and you didn't do that—that you during the time that the probation staff was giving you these opportunities you were not cooperative, you did not cooperate with them, you did not comply, you were argumentative and combative, and once again you didn't fulfill the ultimate goals of probation and probation's purposes are exhausted." In light of the record, we conclude that the trial court did not abuse its discretion in revoking the defendant's probation and sentencing him to a period of incarceration.

[13] General Statutes § 53a-30 (b) provides: "When a defendant has been sentenced to a period of probation, the Court Support Services Division may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) of this section which are not inconsistent with any condition actually imposed by the court."

General Statutes § 53a-30 (a) (14) provides in relevant part: "When imposing sentence of probation or conditional discharge, the court may, as a

state to prove that all conditions alleged were violated; it is sufficient to prove that one was violated." (Internal quotation marks omitted.) *State* v. *Lanagan*, 119 Conn. App. 53, 62, 986 A.2d 1113 (2010). Given that we have already concluded that there was sufficient evidence for the trial court to find that the defendant violated the conditions of probation by failing to keep probation officers informed of his whereabouts and to provide a valid and verifiable address, we need not consider whether the office of probation had authority to require the defendant to submit to GPS monitoring, or whether the defendant's refusal to do so constituted a violation of the conditions of his probation. Because such a determination by this court would not affect the disposition of this appeal, we decline to reach this claim.[14]

III

The defendant's final claim is that the trial court erred in denying his oral motion to dismiss. Because "[h]e offers no analysis or authority in support of this claim . . . we decline to review it because it is inadequately briefed." *State* v. *Leary*, 51 Conn. App. 497, 499–501, 725 A.2d 328 (1999). The defendant devotes less than one page of his brief to this claim, which provides little more than a factual account of his oral motion to dismiss raised at the violation of probation hearing, and includes neither argument nor analysis of his passing citation to case law. See *State* v. *T.R.D.*, 286 Conn. 191, 213–14 n.18, 942 A.2d 1000 (2008) (declining to review claim as inadequately briefed where defendant

condition of the sentence, order that the defendant . . . be subject to electronic monitoring, which may include the use of a global positioning system."

[14] We also decline to address this argument on the basis that the trial court made no finding regarding the office of probation's statutory authority to require the defendant to submit to GPS monitoring. See, e.g., *DeFeo* v. *DeFeo*, 119 Conn. App. 30, 32 n.3, 986 A.2d 1099 (2010) (declining to address argument that trial court improperly found that plaintiff did not receive notice of foreclosure where court made no such finding).

"devoted a mere three quarters of a page in his brief to [the] claim, and failed to explicate adequately" the basis of his argument); *State* v. *Duteau*, 68 Conn. App. 248, 261–62, 791 A.2d 591 (declining to review claim as inadequately briefed where defendant failed to "provide either legal authority or analysis to support this claim"), cert. denied, 260 Conn. 939, 835 A.2d 58 (2002). "We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *State* v. *Leary*, supra, 499. Because the defendant's claim is inadequately briefed, we decline to address it.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSEPH WALKER (AC 38916)

Alvord, Sheldon and Mullins, Js.*

Syllabus

Convicted, after a jury trial, of several crimes, including robbery and murder, in connection with the shooting death of the victim during a drug transaction, the defendant appealed, claiming, inter alia, that the trial court committed plain error by failing, sua sponte, to instruct the jury on accomplice testimony with respect to the testimony of his coconspirator's girlfriend, B. The defendant claimed that B, who had been charged with tampering with evidence, had been promised lenient treatment by the state in exchange for her testimony, and that she was an accessory after the fact because she assisted in covering up the crimes at issue by cleaning blood from the vehicle in which the shooting occurred and by disposing of evidence of the murder. This court reversed the defendant's conviction in part, holding, inter alia, that he had waived his right to raise his claim of instructional error and, thus, was foreclosed

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

from seeking consideration of it under the plain error doctrine. Thereafter, the defendant, on the granting of certification, appealed to our Supreme Court, which granted the petition and remanded the case to this court for consideration of his claim of plain error. On remand, *held* that the trial court did not commit plain error by failing to deliver, sua sponte, an accomplice instruction concerning B's testimony, as the evidence did not support the conclusion that B aided the defendant in the commission of any of the crimes with which he was charged so as to warrant an accomplice instruction: B was not present when the defendant murdered the victim, there was no testimony or evidence showing that B was involved in the defendant's plan to obtain drugs from the victim, that B had a shared intention with, or intentionally aided, the defendant in any conduct that constituted the crimes committed against the victim, or that B was even aware of the robbery or murder until after those crimes were completed, and the evidence showed that after the commission of those crimes, B acted under duress when she cleaned the vehicle because of threats and orders from the defendant's coconspirator; accordingly, the court's failure to give, sua sponte, an accomplice instruction concerning B's testimony was not an error so plain on its face and obvious in the sense of being not debatable that it undermined the integrity and fairness of the judicial proceeding so as to necessitate a reversal.

Argued September 11—officially released November 28, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder, conspiracy to commit murder, felony murder, robbery in the first degree, conspiracy to commit robbery in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Cremins*, *J.*; verdict of guilty; thereafter, the court vacated the verdict as to the charge of felony murder; judgment of guilty of murder, conspiracy to commit murder, robbery in the first degree, conspiracy to commit robbery in the first degree and criminal possession of a firearm, from which the defendant appealed; subsequently, this court reversed the judgment in part and remanded the case for further proceedings; thereafter, the defendant filed a petition for certification to appeal with our Supreme Court, which

granted the petition and remanded the case to this court for further proceedings. *Affirmed.*

Katherine C. Essington, assigned counsel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Amy L. Sedensky* and *Terence D. Mariani*, senior assistant state's attorneys, for the appellee (state).

Opinion

MULLINS, J. This case returns to us on remand from our Supreme Court; see *State* v. *Walker*, 325 Conn. 920, 163 A.3d 619 (2017); with direction to consider the claim of plain error raised by the defendant, Joseph Walker. In our previous opinion, we reversed the judgment only with respect to the defendant's conviction of conspiracy to commit robbery in the first degree.[1] *State* v. *Walker*, 169 Conn. App. 794, 812, 153 A.3d 38 (2016), remanded for consideration, 325 Conn. 920, 163 A.3d 619 (2017). We affirmed the judgment in all other respects. Id. As to the defendant's claim that the trial court committed plain error by failing to instruct the jury, sua sponte, on accomplice testimony, we concluded that "[b]ecause the defendant waived his right to raise the present claim of instructional error, he is foreclosed from seeking consideration under the plain error doctrine."[2] Id., 810–11.

[1] In addition to the conspiracy charge, the defendant also was convicted of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a), robbery in the first degree in violation of General Statutes § 53a-134 (a) (2) and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1).

[2] We declined the defendant's request that we exercise our supervisory authority over the administration of justice to review his claim of instructional error. See *State* v. *Walker*, supra, 169 Conn. App. 811–12 ("although the defendant asserts that we should adopt a rule that requires the trial court to give a special credibility instruction in cases where a state's witness

Upon granting the defendant's petition for certification to appeal from our previous decision, the Supreme Court has now directed this court to consider the defendant's claim of plain error in light of *State* v. *McClain*, 324 Conn. 802, 155 A.3d 209 (2017), which held that an implied waiver of a claim of instructional error pursuant to *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011), does not preclude an evaluation of that claim under the plain error doctrine. *State* v. *McClain*, supra, 815. After consideration of the defendant's claim, we conclude that plain error does not exist, and, accordingly, we affirm the judgment.

We set forth the relevant factual and procedural history. "On May 10, 2012, the defendant arranged to purchase $6150 worth of cocaine from the victim, David Caban." *State* v. *Walker*, supra, 169 Conn. App. 796. On May 12, 2012, "the defendant, accompanied by his close friend, Solomon Taylor, drove in a white Mitsubishi Gallant (vehicle), which was owned by Taylor's girlfriend, Alexia Bates, to the home of the victim to purchase . . . cocaine." Id., 797. During the transaction, a struggle ensued between the victim and the occupants of the vehicle. Id. "One of the occupants of the vehicle had a revolver, and the victim was attempting to hold his arm in an effort to avoid being shot; that occupant then fired a shot through the roof of the vehicle." Id. More shots were fired and "the victim [was] hit twice, once in the arm and once in the head." Id. The defendant and Taylor "drove away with the rear passenger's side door open and the victim only partially inside of the vehicle." Id., 798. Shortly thereafter, the victim's body was found in the street "[w]ithin approximately one quarter of a mile" from the scene of the shooting. Id. "The victim was transported to Saint Mary's Hospital, where he died from his wounds." Id.

has been promised a benefit in exchange for his or her testimony, our Supreme Court already has rejected such a request").

"Meanwhile, the defendant drove to the home of Taylor's girlfriend, Alexia Bates. Upon his arrival, the defendant went upstairs into Bates' apartment and proceeded to go into the bathroom to treat a gunshot wound to his hand, which he had suffered during the struggle with the victim. Taylor, who appeared frantic as he was pacing back and forth, encountered Bates and her roommate in the roommate's bedroom. Taylor then asked Bates to go into her bedroom, which she did. Bates could see blood on Taylor's boxer shorts, which later DNA analysis determined belonged to the victim." Id., 798–99.

"Taylor then ordered Bates to go to her vehicle to retrieve the revolver." Id., 799. Taylor threatened Bates, telling her that she "better do whatever the F he told [her] to do or he was going to F [her] up." After Taylor's threat, Bates went to the vehicle. *State* v. *Walker*, supra, 169 Conn. App. 799. In the vehicle, Bates "saw many different sized pieces of crack cocaine mixed with blood and glass on the floor. She also saw blood on the door, on the front seat, in the middle console, on the dashboard where the airbag is contained, and in the back passenger's seat. She saw broken glass on the floor and on the front seat, and bullet holes in the roof. Bates also discovered the revolver, which she then brought upstairs to Taylor, who put it in his waistband. Taylor then told Bates to gather cleaning supplies to clean the vehicle; Bates grabbed a bucket that she filled with water and 'cleaning stuff,' 'sponges, rags . . . [and] Clorox spray.' She also used a bottle of Febreze that already was in the vehicle." Id. Bates explained that she was afraid of Taylor, because he had a gun and he could have killed her if she called the police.

"Bates also took bags out of the trunk of the vehicle, and she and Taylor then removed all of the items from the inside of the vehicle, which included Bates' makeup, her wallet, her coat, the Febreze bottle, a New York

Yankees cap, and other things that she could not remember specifically." Id., 799–800.

"On September 12, 2012, the police arrested the defendant in New York. After a jury trial, the defendant was found guilty of all charges against him. . . . The court sentenced the defendant . . . [to] a total effective sentence of sixty years incarceration, twenty-five years of which were mandatory." Id., 800–801. Additional facts will be set forth as necessary.

The sole question presented on remand is whether the trial court committed plain error by failing to instruct the jury, sua sponte, on accomplice testimony with regard to Bates. The defendant claims that Bates' assistance with the coverup of the crimes, by helping to clean the vehicle, provided a basis for an accomplice instruction. In particular, he argues that Bates' participation in the coverup resulted in her being charged with tampering with evidence, and, therefore, she "had the same motive to curry favor with the prosecution as an accomplice to the murder." Thus, according to the defendant, the court had a duty to instruct the jury to scrutinize her testimony carefully. We disagree.

We begin by setting forth the legal principles that govern our consideration of this claim. "[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this

very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record.

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 596–97, 134 A.3d 560 (2016).

"Generally, a defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely. . . . An exception to this rule, however, involves the credibility of accomplice witnesses. . . . [W]here it is warranted by the evidence, it is the *court's duty* to caution the jury to scrutinize carefully the testimony if the jury finds that the witness intentionally assisted in the commission, or if he assisted or aided or abetted in the commission, of the offense with which the defendant is charged. . . . The court's duty to so charge is implicated only where the trial court has before it sufficient evidence to make a determination that there

is evidence that the witness was in fact an accomplice." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Underwood*, 142 Conn. App. 666, 674–75, 64 A.3d 1274, cert. denied, 310 Conn. 927, 78 A.3d 146 (2013).

"An accomplice is [a] person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense . . . . General Statutes § 53a-8 (a). [I]n order for one to be an accomplice there must be mutuality of intent and community of unlawful purpose with the defendant." (Internal quotation marks omitted.) *State* v. *Underwood*, supra, 142 Conn. App. 675.

In this case, the defendant claims that although "Bates may not have shared an intent as to the murder itself, she had a shared intent and community of purpose with respect to its coverup." Essentially, the defendant argues that Bates was an accessory after the fact, and, therefore, the court committed plain error by failing to instruct the jury, sua sponte, on accomplice testimony with respect to her testimony.[3] In support of this contention, the defendant directs this court to Bates' testimony that when "she lent her [vehicle] to her boyfriend . . . Taylor, prior to the drug deal that led to the shooting, she knew Taylor was a drug dealer and had seen him with a gun, and she helped clean the [vehicle] of blood and dispose of the evidence of the murder afterward." The defendant also posits that Bates was "charged with offenses based on the same set of facts that led to the charges against Taylor and [the defendant], and . . . the state had promised her lenient

[3] The defendant fails to cite, and the court is unable to find, any Connecticut authority to support the proposition that an accomplice instruction is required for an accessory after the fact.

treatment in her pending case in exchange for her testimony."[4] According to the defendant, this evidence was sufficient to implicate the court's duty to provide an accomplice testimony instruction with regard to Bates. We disagree. These circumstances do not support a determination that Bates was an accomplice such that the court was required to give, sua sponte, an accomplice instruction.

First, Bates was not with the defendant when he murdered the victim. Indeed, there was no testimony from the defendant or any other witness that attributed any involvement by Bates in the defendant's plan to obtain drugs from the victim. There also was no evidence that Bates had any shared intention with the defendant to commit any crimes against the victim once the defendant encountered the victim. Second, there was no evidence showing that Bates intentionally aided the defendant in any conduct that constituted the crimes against the victim, i.e., robbery or murder. In fact, there was no evidence that Bates even was aware of the robbery or the murder until the defendant and his coconspirator returned to her residence after completing those crimes.

The evidence shows that once the defendant and Taylor returned to Bates' home, although Bates helped to clean the vehicle, she did not do so voluntarily. The evidence shows that Taylor threatened her, by telling her he would "F her up if she did not do whatever the F he wanted her to do" and then he ordered her to clean

[4] Although there was an agreement between the prosecution and Bates that provided for leniency with regard to the pending charge of tampering with evidence, there is no requirement that the trial court issue a special credibility instruction for every witness who is in a position to receive a benefit for their testimony. See *State* v. *Diaz*, 302 Conn. 93, 100 n.5, 25 A.3d 594 (2011) (declining request to require trial courts to give special credibility instruction whenever witness in criminal case is in position to receive benefit from state in exchange for testifying).

the vehicle. As a result, Bates testified, she cleaned the bloody vehicle because she was afraid of Taylor. She explained that she feared him because he had a gun and could have killed her if she called the police. Thus, the evidence did not show Bates to be a willing participant but, rather, it showed that Taylor threatened Bates in order to make sure that she would do what he told her to do.

Given that Bates was not present at the crime scene, was not a participant in the crimes with which the defendant was charged, was not aware of the commission of the crimes prior to or during their commission, only helped to clean the bloody vehicle under duress, and only after the crimes already had been completed, she clearly did not have the mutuality of intent or community of unlawful purpose to commit the robbery and murder the victim. Accordingly, Bates was not charged with the same crimes as the defendant or as a coconspirator. Instead, Bates was charged with tampering with evidence. See *State* v. *Underwood*, supra, 142 Conn. App. 677–78 (evidence did not support conclusion that witness was accomplice despite witness having been charged with tampering with evidence for disposing of gun used by defendant because witness did not have mutual intent or community of unlawful purpose with defendant to commit crimes against victim). Put simply, the evidence did not support the conclusion that Bates aided the defendant in the commission of any of the crimes with which he was charged; therefore, an accomplice instruction was not warranted here. Cf. *State* v. *Bree*, 136 Conn. App. 1, 19–20, 43 A.3d 793 (accomplice instruction warranted where witness was named as coconspirator and there was "substantial evidence tending to show that he aided or abetted" commission of charged crime), cert. denied, 305 Conn. 926, 47 A.3d 885 (2012).

Further, we find our Supreme Court's decision in *State* v. *Boles*, 223 Conn. 535, 613 A.2d 770 (1992), particularly instructive. In *Boles*, the defendant claimed that the court committed plain error by not delivering, sua sponte, an accomplice instruction to the jury regarding a particular witness. In that case, the witness was present when the defendant killed the victim, and he assisted the defendant in disposing of the victim's body. Id., 551. The witness testified that he acted under duress because the defendant threatened to kill him if he did not assist with moving the victim's body. Id., 539. Our Supreme Court ruled that the trial court reasonably could have found that the evidence "did not indicate mutuality of intent and community of unlawful purpose or that the evidence thereof was so insufficient, inconclusive or ambivalent that an accomplice instruction was not appropriate." Id., 552. The court further concluded that "the omission of an accomplice instruction in the court's charge to the jury, if misguided, was not so obvious or egregious that it merits plain error review." Id.

In light of *Boles*, the facts of the present case provide an even stronger basis for this court to conclude that no error arose from the trial court's failure to deliver, sua sponte, an accomplice instruction with respect to Bates' testimony. First, unlike the witness in *Boles*, Bates was not present at the crime scene during the commission of the crimes. Therefore, it is much clearer in this case that Bates was not an active participant in the robbery and murder of the victim. Second, there was evidence that Bates, like the witness in *Boles*, acted under duress in helping to clean the vehicle after the commission of the crimes as a result of Taylor's threats and orders that she do so. Consequently, it is not at all clear that Bates willingly assisted in a coverup by cleaning the vehicle.

Thus, here, as in *Boles*, the evidence adduced at trial did not so clearly support the conclusion that Bates was an accomplice that it was plain error for the trial court not to deliver, sua sponte, a special credibility instruction. See id., 552. On the contrary, on the basis of the evidence before it, the trial court's failure to give an accomplice instruction concerning Bates' testimony would not have been improper even if the defendant had requested such an instruction. Accordingly, the court's failure to give, sua sponte, an accomplice instruction was not "so clearly and obviously an error that it undermines the integrity and fairness of the judicial proceeding necessitating reversal." *State* v. *McClain*, supra, 324 Conn. 820–21.

Under these circumstances, we conclude that the omission of an accomplice instruction was not an error, much less an error so plain on its face and obvious in the sense of being not debatable. Consequently, the defendant's claim fails to meet the high standard of the plain error doctrine.

The judgment is affirmed.

In this opinion the other judges concurred.

ADAM CARMON *v.* COMMISSIONER OF CORRECTION (AC 39467)

DiPentima, C. J., and Lavine and Mullins, Js.*

Syllabus

The petitioner, who previously had been convicted of, inter alia, murder in connection with a shooting incident and had filed three petitions for a writ of habeas corpus, filed a fourth petition for a writ of habeas corpus, claiming, inter alia, that he was denied due process. Specifically, he claimed that the state had failed to turn over to his criminal trial counsel

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

a fingerprint analysis report that allegedly constituted exculpatory evidence under *Brady* v. *Maryland* (373 U.S. 83), and showed that the fingerprints of B, who had been the initial suspect in the shooting, were on an ammunition box that had been found at a church near the location of the shooting. The petitioner further claimed that the fingerprint analysis report was newly discovered evidence that established his actual innocence. The habeas court rendered judgment dismissing the petition in part and denying it in part, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly concluded that he was not denied due process as a result of the state's failure to turn over the fingerprint analysis report to his criminal trial counsel: even if the fingerprint analysis report was suppressed by the state, the petitioner failed to prove that it was material under *Brady*, as it was known that B had been in the area of the crime scene hours before the shooting, there was no evidence that the shooter had an ammunition box at the crime scene or had dropped such a box outside the nearby church, and there was no evidence that anyone saw the shooter load a weapon at or near the church; moreover, the petitioner was identified as the shooter by two eyewitnesses, one of whom had been standing approximately six feet from the shooter and had an unobstructed view of the shooter, there was evidence that tied the petitioner to the firearm that had been used in the shooting, and, therefore, the existence of the report, even if improperly suppressed by the state, did not undermine confidence in the verdict.

2. This court found unavailing the petitioner's claim that the habeas court improperly concluded that he failed to prove that his criminal trial counsel and prior habeas counsel provided ineffective assistance by failing to investigate or to present the fingerprint analysis report; this court having concluded that the petitioner failed to establish that the report was material, the petitioner could not establish that he was prejudiced by the alleged deficiency of counsel in failing to discover or to present the report.

3. The habeas court properly determined that the petitioner failed to establish his claim of actual innocence, which was based on his assertion that the fingerprint analysis report was newly discovered evidence that exonerated him; even if the report was newly discovered evidence, it proved nothing more than that B's fingerprints were on an empty ammunition box that was located outside a church that was near the crime scene, and the petitioner was tied to the firearm that was used in the shooting by more than one of the state's witnesses, and was identified by two eyewitnesses to the shooting, one of whom stated that she was positive that B was not the shooter.

Argued September 18—officially released November 28, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment dismissing the petition in part and denying the petition in part, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Erica A. Barber, assigned counsel, for the appellant (petitioner).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Grayson Colt Holmes*, former special deputy assistant state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. The petitioner, Adam Carmon, appeals from the judgment of the habeas court, dismissing in part and denying in part, his fourth petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the habeas court improperly concluded that he failed to establish that (1) the state had violated *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by withholding critical exculpatory evidence at the time of his criminal trial, (2) his criminal trial counsel, first habeas counsel, and second habeas counsel all had provided ineffective assistance, and (3) he was entitled to immediate release on the basis of actual innocence. We affirm the judgment of the habeas court.

The opinion of this court from the petitioner's direct appeal set forth the following facts underlying the petitioner's conviction: "On the night of February 3, 1994,

[1] The habeas court granted the petitioner certification to appeal. See General Statutes § 52-470.

Charlene Troutman was in the living room of her apartment located on Orchard Street in New Haven waiting for a taxicab. With her, among others, was her seven month old granddaughter. Shots fired from the street passed through the living room window killing the granddaughter and leaving Troutman permanently paralyzed. At the time the shots were fired, Jaime Stanley and Raymond Jones were [in a vehicle] stopped at a traffic light near Troutman's apartment and saw a man firing into the apartment. As the shooter ran away, both Stanley and Jones saw his face. Both witnesses identified the [petitioner] during trial as the person who had fired the shots through the window of Troutman's apartment." *State* v. *Carmon*, 47 Conn. App. 813, 815, 709 A.2d 7, cert. denied, 244 Conn. 918, 714 A.2d 7 (1998).

On the basis of this evidence, following a guilty verdict by the jury, the trial court rendered judgment of conviction against the petitioner for murder, assault in the first degree and carrying a pistol without a permit. Id., 814–15. The court then sentenced the petitioner to a total effective term of eighty-five years incarceration. Following a direct appeal, this court affirmed the judgment of conviction, and our Supreme Court denied the petition for certification to appeal. *State* v. *Carmon*, 244 Conn. 918, 714 A.2d 7 (1998).

Thereafter, the petitioner filed a petition for a writ of habeas corpus claiming that his criminal trial counsel, Richard Silverstein, as well as his appellate counsel, Suzanne Zitser, had provided ineffective assistance; the habeas court denied that petition, but granted the petition for certification to appeal. See *Carmon* v. *Commissioner of Correction*, 114 Conn. App. 484, 486, 969 A.2d 854, cert. denied, 293 Conn. 906, 978 A.2d 1108 (2009). The petitioner filed an appeal, which we dismissed after he failed to file an appellate brief. Id., 486–87.

The petitioner then filed a second petition for a writ of habeas corpus, claiming again that his criminal trial counsel had provided ineffective assistance. In this second petition, he included allegations of deficient performance that had not been alleged in his first petition. Id., 487. Specifically, the petitioner alleged, in relevant part, that Silverstein had performed deficiently because he had failed to investigate and to introduce fingerprint evidence taken from a storm window at the crime scene and from an empty ammunition cartridge box found near the crime scene. Id.

Following a habeas trial, the court issued a memorandum of decision denying the petition for a writ of habeas corpus. Id. We affirmed the judgment of the habeas court on appeal, and our Supreme Court denied the petition for certification to appeal. *Carmon* v. *Commissioner of Correction*, 293 Conn. 906, 978 A.2d 1108 (2009).

Then, the petitioner filed a third petition for a writ of habeas corpus, claiming that his criminal trial counsel, first habeas counsel, and second habeas counsel all had provided ineffective assistance. See *Carmon* v. *Commissioner of Correction*, 148 Conn. App. 780, 782, 87 A.3d 595 (2014). He also alleged that several material witnesses had given false testimony during his criminal trial, that the state had withheld exculpatory evidence, that his conviction was rendered on the basis of prosecutorial impropriety, and that he is actually innocent. Id. When the petitioner failed to respond to the request by the respondent, the Commissioner of Correction, for a more specific statement, the habeas court defaulted the petitioner and rendered judgment dismissing the petitioner's third habeas case. Id., 784. We affirmed that judgment on appeal. Id., 788.

During the pendency of the petitioner's appeal from the judgment of dismissal of his third habeas petition,

however, the petitioner filed the present habeas petition, his fourth. In this petition, the petitioner alleged: as to count one, his criminal trial counsel, and his first and second habeas counsel all had provided ineffective assistance;[2] as to count two, the state knew or should have known that the testimony of several of its witnesses was false; as to count three, the state violated his right to due process by permitting the witnesses to provide false testimony; as to count four, the state violated *Brady* v. *Maryland*, supra, 373 U.S. 83, by not turning over exculpatory evidence; as to count five, the prosecutor committed impropriety, which was based on the allegations in counts two through four of the petition; and, as to count six, actual innocence.

The respondent asserted several special defenses: (1) as to count one, the respondent asserted that the fourth petition was successive as to the petitioner's criminal trial counsel and first habeas counsel, and that the petitioner failed to state a claim as to his second habeas counsel; (2) as to counts two through five, the petitioner had procedurally defaulted on those counts; and, as to count six, the petition was successive.[3] The petitioner responded, inter alia, that there was newly discovered evidence in the form of a fingerprint analysis report that proved that the fingerprints on the ammunition box found near the crime scene belonged to Arthur Brantley, an early suspect in this shooting. The petitioner contended that this report had not been disclosed by the prosecution at the time of his last petition that was decided on the merits, namely, the second petition for a writ of habeas corpus.

[2] In his fourth habeas petition, the petitioner also had alleged in count one that appellate counsel on direct appeal had provided ineffective assistance. It appears that the petitioner did not pursue that allegation.

[3] The respondent did not pursue his defense of successive petition on any count.

After a trial, the habeas court determined that the allegations in count one, which were that his trial counsel, and his first and second habeas counsel had provided ineffective assistance by failing to investigate and to call certain expert witnesses, were abandoned due to inadequate briefing. Additionally, the court found that those allegations were "without factual foundation and support in the record." The court further found that the petitioner had failed to prove that the failure of his criminal trial counsel to introduce the fingerprint analysis report was prejudicial to the petitioner. In addition, the court found that neither the petitioner's first nor his second habeas counsel had the fingerprint analysis report, but that the petitioner failed to establish that he was prejudiced by their failure to obtain and to present this evidence because it was not material. Accordingly, the court rejected count one of the fourth habeas petition.

As to counts two and three of the fourth petition, regarding the allegations of perjured testimony, the court found that the petitioner was procedurally defaulted from raising these claims, and it dismissed them. As to count four, alleging a *Brady* violation, the court found that the petitioner had failed to prove that the state had not disclosed, at the time of his criminal trial, the fingerprint analysis report. The court also found that this evidence, even if not disclosed, was not material. As to count five of the fourth petition, the court rejected the allegations in that count on the basis of its rejection of counts two through four, which formed the basis of the alleged prosecutorial impropriety allegation in count five. As to count six, the actual innocence claim, the court concluded that the fingerprint analysis report was not newly discovered evidence because the petitioner did not establish that his criminal trial counsel did not have the report at the time of trial. Alternatively, the court found, even if it were to assume

arguendo that this evidence was newly discovered, on the basis of the "credible evidence in the record and reasonable inferences to be drawn therefrom . . . the evidence of Brantley's fingerprints on [the] cartridge box [did] not render the petitioner's conviction unreliable and [that evidence, if presented, was] not likely to have changed the outcome of his trial."

In sum, the habeas court dismissed counts two and three, and, otherwise, denied the remaining counts in the petitioner's fourth petition for a writ of habeas corpus. Thereafter, the habeas court granted the petition for certification to appeal. This appeal followed.

We next set forth additional facts that are relevant to the petitioner's claims on appeal. During the petitioner's criminal trial, there was testimony that Troutman's son owed money to Brantley, a drug dealer. According to Brantley's testimony, Brantley and Troutman's son had a confrontation on the day of the shooting when Brantley tried to collect money that Troutman's son owed to him for drugs. Several hours after the fight, the shooting occurred. The police initially focused on Brantley as a suspect.

During the trial on the petitioner's second petition for a writ of habeas corpus, the following relevant testimony was provided: "James Stephenson, a firearms and tool mark examiner at the state forensic science laboratory, testified that he was a detective with the New Haven police department's bureau of identification at the time of the shootings in February, 1994. The morning after the incident, he had been assigned to the crime scene and had processed latent fingerprints . . . on an empty cartridge box found near that building.[4] Although

[4] "The shootings had occurred at 810 Orchard Street. The parking lot of a church was located next to 810 Orchard Street. The church itself was located at 806 Orchard Street, the next building beyond the parking lot. The cartridge box was located in front of the church." *Carmon* v. *Commissioner of Correction*, supra, 114 Conn. App. 489 n.3.

he was able to process fingerprints . . . Stephenson testified that he did not know whether those fingerprints were identifiable. . . .

"The second witness, George Shelton, Jr., indicated that he was a latent fingerprint examiner with the New Haven department of police service. Shelton testified that in 2005, his supervisor requested that he compare fingerprint impressions on file in the criminal case with the petitioner's fingerprints. . . . With respect to the cartridge box, Shelton testified that he had been unable to locate the latent fingerprints [from the cartridge box] that had been processed by Stephenson in 1994. For that reason, he was unable to indicate whether those fingerprints had been identifiable and, if so, whether they matched the fingerprints of the petitioner or the other individuals . . . . There was no testimony as to when the fingerprints had last been seen . . . ." (Footnote in original.) *Carmon* v. *Commissioner of Correction*, supra, 114 Conn. App. 489–90.

During the current habeas proceeding, the following additional testimony and evidence was presented. In 2009, the petitioner filed a freedom of information request with the New Haven Police Department. In response to that request, the Office of the Corporation Counsel for the City of New Haven provided the petitioner's attorney with, among other things, a police incident report, dated February 11, 1994, and signed by Detective Robert Benson (fingerprint analysis report). In that fingerprint analysis report, which had not been presented to the jury at the petitioner's criminal trial, Benson indicated that, on February 4, 1994, he "examined the latent lifts [taken by Stephenson from the ammunition box] and compared them to the known inked impressions of Arthur Brantley . . . and the followin[g] identification was effected: a latent [print] located on a side of the [box] was identified as having been made by the right index finger of Arthur Brantley,

and the . . . lift from the side of the ammunition [box]. The latent lift identified was found to have been made by Arthur Brantley to the exclusion of all other persons. [Detective Christopher] Grice, a certified latent print examiner, verified the identification and concurred with my findings. This report will be forward[ed] to ISU for follow-up; the latent lifts will be on file in the [i]dentification [u]nit. A chart that illustrates the identification will be prepared upon request from the court." Additional facts will be set forth as necessary to address fully the petitioner's claims on appeal.

I

The petitioner first claims that the "habeas court erred in concluding that [he] was not denied due process where the state withheld crucial exculpatory evidence in violation of *Brady* v. *Maryland*, [supra, 373 U.S. 83]." The petitioner argues that the state failed to turn over to his criminal trial counsel the fingerprint analysis report that demonstrated that the fingerprints on the ammunition box found in front of a neighboring church belonged to the initial suspect in this case, Brantley. The respondent counters that the habeas court properly concluded that the petitioner failed to establish that the state had not disclosed this evidence. Furthermore, the respondent argues, even if the state did fail to disclose the evidence, the petitioner did not establish that the evidence was material, such that its absence undermines confidence in the jury's verdict. Under the facts of the present case, we conclude that even if we were to assume, without deciding, that the fingerprint analysis report was suppressed by the state and that the report would have been admissible in the criminal trial, this evidence was not material under *Brady*.

"The law governing the state's obligation to disclose exculpatory evidence to defendants in criminal cases is well established. The defendant has a right to the

disclosure of exculpatory evidence under the due process clauses of both the United States constitution and the Connecticut constitution. [Id., 86]; *State* v. *Simms*, 201 Conn. 395, 405 [and] n.8, 518 A.2d 35 (1986). In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material." (Internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 271–72, 49 A.3d 705 (2012).

"Under the last *Brady* prong, the prejudice that [a] defendant suffered as a result of the impropriety must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Internal quotation marks omitted.) *State* v. *Ortiz*, 280 Conn. 686, 717, 911 A.2d 1055 (2006). "[T]he test for materiality under *Brady* and the test for prejudice under *Strickland* [for ineffective assistance of counsel] are the same . . . ." (Internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 704, 159 A.3d 1112 (2017).

"[A] trial court's determination as to materiality under *Brady* presents a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error." *State* v. *Ortiz*, supra, 280 Conn. 720. "Because the [habeas] trial judge had the opportunity, however, to observe firsthand the proceedings at [the habeas] trial, including the cross-examination of [witnesses], our independent review nevertheless is informed by [the habeas judge's] assessment of the impact of the *Brady* violation, [if any] and we find persuasive the Second Circuit Court of Appeal's approach of engaging in independent review, yet giving 'great weight' to the [habeas] trial judge's conclusion as to the effect of nondisclosure on the outcome of the [criminal] trial . . . ." Id., 721–22, quoting *United*

States v. *Zagari*, 111 F.3d 307, 320 (2d Cir.), cert. denied sub nom. *Shay* v. *United States*, 522 U.S. 988, 118 S. Ct. 455, 139 L. Ed. 2d 390 (1997); see also *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 262–64, 112 A.3d 1 (2015).

As to materiality, the habeas court found, inter alia, that, in the absence of this evidence, the petitioner, nonetheless, had received a fair trial. The court pointed to Silverstein's testimony at the habeas trial that, during the petitioner's criminal trial, he was using Brantley as "kind of a red herring"; (emphasis omitted); and that he was convinced that Brantley was not the shooter because of pretrial information he had received from the prosecutor. The court also stated that it recollected that Silverstein was convinced that it would have been "impossible" for Brantley to have been the shooter.

The court stated that it had conducted a "lengthy review of the entire record of two decades of litigation, including previous court decisions, trial transcripts and numerous exhibits . . . ." Furthermore, it had reviewed the "eyewitness testimony, statements from the petitioner, and . . . reasonable inferences [that could] be drawn therefrom . . . ." On the basis of this record, the habeas court concluded, in relevant part, that its confidence in the verdict was not undermined; the petitioner had received a fair trial. We agree with that assessment.

Following our own review of the record, we conclude that the petitioner has failed to prove that the fingerprint analysis report was material. First, although Brantley had been an early suspect in the shooting, and his fingerprints were found on the ammunition box, it was known that he had been in that area hours prior to the shooting and that he engaged in a physical altercation at the crime scene. Second, there is no evidence that the shooter had with him an ammunition box at the crime

scene or that the shooter had dropped or discarded such a box outside the nearby church. Third, there also was no evidence that anyone saw the shooter load a weapon while standing at or near the neighboring church. Fourth, there were two eyewitnesses to this shooting, both of whom came forward and positively identified *the petitioner* as the shooter. Fifth, the evidence at the petitioner's criminal trial demonstrated that one of those eyewitnesses, Stanley, was approximately six feet from the shooter and that she had an unobstructed view of the shooter; when she was shown a photograph of Brantley during the police investigation, she stated that she was positive that the person depicted in that photograph *was not the shooter*.

Finally, there was evidence that tied the petitioner to the firearm that had been used in the shooting. Timothy McDonald, a former member of the "Fifth Ward" gang[5] testified that the petitioner also had been a member of that gang, and that he knew the petitioner by the name "Twenty." During the criminal trial, McDonald was shown the firearm that had been used in the shooting, and he identified it as a firearm he previously had possessed. McDonald further testified that he had sold that firearm to the petitioner for $200, months before the shooting.

In addition to McDonald's testimony, another witness at the petitioner's criminal trial, Anthony Stevenson, who also had been a member of the "Fifth Ward" gang, testified that, after the shooting, the petitioner had been in possession of the firearm used in the shooting, and that the petitioner had given him the firearm to use in an unrelated crime. It was from Stevenson that the police recovered the firearm when responding to this unrelated matter.

[5] The Fifth Ward gang was described at the petitioner's criminal trial as a violent "drug selling gang," involved with a "lot of guns . . . ."

On the basis of our independent review of the record, we agree with the habeas court that the petitioner failed to prove that the fingerprint analysis report, which demonstrated that Brantley's fingerprints were on the ammunition box found in front of a neighboring church, was material. The existence of this report, even if improperly suppressed by the state, does not undermine our confidence in the verdict. Accordingly, we conclude that the court properly denied the habeas petition on this ground.

II

The petitioner next claims that the habeas court improperly concluded that he failed to prove that his criminal trial counsel, and his first and second habeas counsel all had provided ineffective assistance by failing to investigate adequately the existence of the fingerprint analysis report and/or to present that report. We conclude on the basis of our analysis in part I of this opinion that even if we were to assume that the petitioner is correct that counsel were deficient for failing to uncover or to present this report, the petitioner cannot establish prejudice.

Under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), "[a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome."

(Citation omitted; internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 264–65. "[T]he test for materiality under *Brady* and the test for prejudice under *Strickland* [for ineffective assistance of counsel] are the same . . . ." Id., 266–67.

"As in the case of an alleged *Brady* violation, [i]n order to demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction. . . . [T]he respective roles of the habeas court and the reviewing court are also the same under *Strickland* as they are under *Brady*. As a general matter, the underlying historical facts found by the habeas court may not be disturbed unless they were clearly erroneous . . . . [W]hether those facts constituted a violation of the petitioner's rights under the sixth amendment [however] is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Citation omitted; internal quotation marks omitted.) Id., 265.

Because we already have concluded in part I of this opinion that the petitioner failed to establish materiality under *Brady* of the fingerprint analysis report, he cannot establish that he was prejudiced by the alleged deficiency of counsel in failing to discover and/or to present the fingerprint analysis report. See id.; see also *Breton* v. *Commissioner of Correction*, supra, 325 Conn. 704. Accordingly, the habeas court properly denied the petition on this ground.

III

Finally, the petitioner claims that the habeas court improperly concluded that he failed to prove his claim

of actual innocence, which, he contends, entitles him to immediate release.

"[T]he proper standard for evaluating a freestanding claim of actual innocence, like that of the petitioner, is twofold. First, the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did, no reasonable fact finder would find the petitioner guilty of the crime." *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 747, 700 A.2d 1108 (1997).

"Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt. . . . Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime. . . . Affirmative proof of actual innocence is that which might tend to establish that the petitioner could not have committed the crime even though it is unknown who committed the crime, that a third party committed the crime or that no crime actually occurred. . . .

"Discrediting the evidence on which the conviction rested does not revive the presumption of innocence. To disturb a long settled and properly obtained judgment of conviction, and thus put the state to the task of reproving its case many years later, the petitioners must affirmatively demonstrate that they are in fact innocent. . . . Nevertheless, we have recognized that, [u]nder circumstances where new, irrefutable evidence is produced that so completely eviscerates the prosecution's case such that the state would have no evidence to go

forward with upon retrial, perhaps a functional equivalent to actual innocence might credibly be claimed." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 802–803, 138 A.3d 908 (2016).

In the present case, the petitioner asserts that the fingerprint analysis report is newly discovered evidence that exonerates him from the shooting. He argues that "[n]o rational trier of fact could find proof of [his] guilt beyond a reasonable doubt." Accordingly, he argues, the habeas court erred in rejecting this claim. We conclude that even if we were to assume that the fingerprint analysis report was newly discovered evidence, we, nonetheless, would find no merit to the petitioner's claim.

The fingerprint analysis report proves that Brantley's fingerprints were on an empty ammunition box that was located outside a church that was near the crime scene. It proves nothing more than that. The petitioner was tied to the firearm that was used in the shooting by more than one of the state's witnesses. He was positively identified by two eyewitnesses to the shooting, and one of those witnesses stated that she was positive that Brantley was not the shooter. We conclude that the habeas court properly determined that the petitioner failed to establish that he was actually innocent.

The judgment is affirmed.

In this opinion the other judges concurred.